18/09; [2009] VSC 270

SUPREME COURT OF VICTORIA

MURDACA v MAGISTRATES' COURT of VICTORIA

Pagone J

22, 29 June 2009

COMMITTAL PROCEEDINGS – PERJURY CHARGES FILED BY A PRIVATE INFORMANT – APPLICATION BY INFORMANT FOR AN ORDER THAT A NUMBER OF PERSONS BE EXAMINED AS POTENTIAL WITNESSES – APPLICATION REFUSED BY MAGISTRATE – HAND-UP BRIEF SERVED WITH COURT – SUBSEQUENT APPLICATION MADE BY INFORMANT FOR THE EXAMINATION OF PERSONS AS POTENTIAL WITNESSES – APPLICATION REFUSED – NO SUFFICIENT NEW MATERIAL PLACED BEFORE THE MAGISTRATE – TEST TO BE APPLIED BY MAGISTRATE – NATURE OF STATUTORY PROVISIONS RELATING TO THE COMPULSORY EXAMINATION PROCEDURE IN COMMITTAL PROCEEDINGS – WHETHER MAGISTRATE IN ERROR IN REFUSING SECOND APPLICATION: *MAGISTRATES' COURT ACT* 1989, S56A.

M. filed a number of charges of perjury as a private informant against certain persons arising from evidence they had given in a County Court proceeding in 2002. As part of the committal proceedings, M. applied to the Magistrate to have a number of persons examined as potential witnesses in each of the private prosecutions. The Magistrate refused the application. A short time later, M. filed with the Magistrates' Court a hand-up brief and made further applications to the Magistrate to examine some ten people. These further applications were refused, the Magistrate stating that the relevant question was whether there was sufficient new material to justify a further application. Upon an application seeking orders to compel the Magistrate to consider the applications—

HELD: Application rejected.

1. The guiding test for the appropriateness of fresh applications seeking the same thing as had previously been rejected is whether the subsequent application amounts to an abuse of process. It is in that context that decision makers look to such matters as proof of fraud in the earlier decision or to the existence of fresh evidence that might require a different outcome from that previously reached. A party may have an entitlement to make an application more than once, but to exercise that right may be an abuse of the Court's process where the outcome can be expected to be the same. To justify the making of the same application again (that is, to justify a Court invoking the same process a second time) there must be something in the second application that may be thought to bear rationally and probatively upon the outcome that could make a difference. Whether a separate application may otherwise be bound to fail might be thought, analytically and as a matter of logic, to be an insufficient explanation for not embarking upon an enquiry which, as the reason would suggest, would, once embarked, be rejected.

***Guss v Magistrates' Court of Victoria* [1998] 2 VR 113, applied.**

2. The Magistrate did not misstate the relevant test. The Magistrate's use of the word "sufficient" was not to be understood as requiring any unauthorised threshold not found in the legislation but, rather, as no more than a reference to something else not previously before the Court that would bear upon the jurisdiction such as to warrant a new application on what had previously been decided. There may be "new material" filed in Court which on no view could bear upon the issue which the decision maker was called upon to determine once the jurisdiction was embarked upon. A new application made on the basis of something which was not previously available to the Court but which does not bear upon the outcome sought to be achieved would not be justified. It is in that sense that the Magistrate must be understood as using the word "sufficient" preceding the words "new material". It was no more than a correct, convenient and shorthand way of expressing the same idea as that in *Guss*, namely, that for a second application to be brought there needed to be fresh "evidence, in the sense used in relation to admission of evidence in appeals". That is, that the new material relied upon will bear upon the outcome sought in a way that is probative, relevant and admissible to the jurisdiction sought to be invoked. The new material needed to justify a second application must be "sufficient" in that sense, and the Magistrate did not err in law in the statement of the test to be applied.

3. The Magistrates' Court's power to order compulsory examination under s56A of the *Magistrates' Court Act* 1989 is conditioned upon it being "satisfied that it is in the interests of justice" to make an order requiring a person to attend before the Court for the purpose of being examined by or on behalf of the informant or to produce a document, a thing or both. The section provides a coercive

investigatory power to compel persons to be examined or to produce documents or things who would otherwise be reluctant to assist with investigations. It is not a power to be exercised merely upon request but, rather, requires an applicant to satisfy the Court that the order should be made because it is in the interests of justice that it should be made. The power to compel questioning is not given to the informant; rather it is given to a Court upon application and by reference to the interests of justice. It may be thought that placing the power in the Court was intended to provide a safeguard against the inappropriate use of the coercive power created by the section. The applicant has a duty to satisfy the Court that it is appropriate that the order sought should be made. In discharging that duty it will ordinarily be desirable for the applicant to show the relevance of the evidence sought to be obtained to the proceeding, to show the scope and purpose of the proposed questioning and to explain how the questioning relates probatively (that is, how it will or may have effect in and upon) the facts in issue. The duty upon an applicant to satisfy the Court that it is in the interests of justice for the application to be granted is particularly significant when it is borne in mind that the defendant to a proceeding in respect of which an application under s56A is made is not a party to the application, may not cross-examine the witness, may not address the Court on the application and, although he or she may attend the proceeding, may only address the Court if it determines that there are exceptional circumstances. The possibility of a misuse of s56A, and the absence of a controverter in such an application, are matters which add to the conclusion that applications should not be granted lightly.

4. The "new" material neither established why an order under s56A should be made nor (assuming that there may be any practical difference in this case) did it establish that the application previously decided should be reconsidered. The Magistrate's observations about the material containing inadmissible hearsay statements and the statements containing little relevant inadmissible material were accurate descriptions of much of the material as filed. What was wholly lacking before the Magistrate was any successful discharge of the burden upon the applicant to show how any part of the material bore upon the statutory task required by s56A to be undertaken. The material may have been directed to show that the prosecutions had foundation, but the material (however described) was not shown to bear upon whether the jurisdiction previously exercised adversely to Mr Murdaca should be reinvoked.

5. Accordingly, the application to compel the Magistrate to consider the application for persons to be examined was rejected.

PAGONE J:

1. In this proceeding the plaintiff, Antonio Murdaca, seeks orders to compel the defendant, the Magistrates' Court of Victoria, to consider an application made under s56A of the *Magistrates' Court Act* 1989 ("the Act") to have a number of persons examined as potential witnesses in a private prosecution.

2. The relevant background to the current proceedings may for present purposes be traced to 2001. In that year Michael Maisano and Rodney Attard commenced proceedings in the County Court against the plaintiff and Bodycorp Repairers Pty Ltd ("Bodycorp"). Bodycorp is a franchisor of panel repair shops and Mr Murdaca its director. The action by Mr Maisano and Mr Attard alleged that Mr Murdaca and Bodycorp had misrepresented to them that their shop, Bodycorp Malvern, would be placed on trial as a recommended repairer for Australian Associated Motor Insurers Limited ("AAMI") by joining the Bodycorp franchise. Evidence was given in those proceedings by Robert Belleville, Phillip Oswald and Barry Martin that Bodycorp Malvern was not on trial as an AAMI recommended repairer and that there had been no prospect of Bodycorp Malvern being placed on trial. At the time Messrs Belleville, Oswald and Martin were servants or agents of AAMI. Judge Hannon of the County Court accepted this evidence and held that there had been a misrepresentation made to Messrs Maisano and Attard.

3. On 18 April 2008 Mr Murdaca filed charges of perjury as a private informant against Messrs Belleville, Oswald and Martin arising from the evidence they had given in the County Court in proceedings in October 2002. Four charges of perjury were laid against Mr Belleville, four against Mr Martin and five against Mr Oswald. All of the charges related to the evidence they gave in the County Court. On 28 July 2008 Mr Murdaca filed applications pursuant to s56A of the Act to have a number of persons examined as potential witnesses in each of the private prosecutions. On 8 August 2008 Magistrate Dawes refused the applications. On 5 September 2008 Mr Murdaca filed with the Magistrates' Court a hand-up brief and on 10 September 2008 made further applications pursuant to s56A of the Act in each of the private prosecutions to examine some ten people. On 14 October 2008 Magistrate Dawes refused the second applications.

4. On 28 October 2008 the plaintiff filed an originating motion in this Court seeking relief by way of *certiorari* and mandamus in relation to the magistrate's decision of 14 October 2008. It is unnecessary for me to detail all of the procedural steps that then occurred except to mention that on 1 December 2008 Byrne J ordered that the availability of relief by *certiorari* be determined as a separate question and on 18 December 2008 decided that relief in the nature of *certiorari* was not available to quash a decision of a magistrate to refuse Mr Murdaca's applications under s 56A of the Act to examine witnesses in the private prosecutions. That decision was the subject of an unsuccessful appeal to the Court of Appeal.[1] The hearing before me concerned the balance of the proceeding.

5. It was contended for Mr Murdaca that the learned magistrate erred in the construction of the test to be applied in deciding whether to hear the second applications made pursuant to s56A of the Act and that she had failed to make Mr Murdaca aware that she was considering ruling that material provided in the hand-up brief may not have been admissible or relevant to the further applications which had been made by him.

6. The Court has jurisdiction under Order 56 of the Supreme Court (General Civil Procedure) Rules 2005 to issue a writ of mandamus to compel a magistrate to act in accordance with the law irrespective of whether a writ of *certiorari* is available.[2] In this case it was accepted by her Honour that fresh applications under s56A could be made. Section 56A does not preclude further applications being made notwithstanding that one has been rejected, however a question arises about when such an application can be entertained. In *Guss v Magistrates' Court of Victoria*[3] (a case relied upon by the plaintiff before me) Batt J said:

> Their Honours relied on the principle relating to abuse of process, holding that a second application is an abuse of process unless there is proof of fraud or it is sought to adduce "fresh" evidence, in the sense used in relation to admission of evidence in appeals. If the evidence was available at the time of the first application and there is no explanation of why it was not then put forward, then, at least, the second application will constitute an abuse of process. Those conditions were satisfied in the third application in the present case and, if, as I think, that part of *Christie v Baker* [1996] VicRp 89; [1996] 2 VR 582 is applicable to s110, the magistrate was bound to dismiss the application and not to investigate it, contrary to the plaintiff's contention before me. If anything, the magistrate's test of "newness" was too generous. Certainly he should not have gone further, as the plaintiff contended.[4]

His Honour later said:

> Counsel for the second defendant advanced a further argument, that the plaintiff's application for a rehearing was bound to fail because it was a third application and, if there was new material, the material was available at the time of the earlier applications and there was no explanation of the failure to adduce that evidence; and, because the grant of relief in the nature of *certiorari* being discretionary, a court of review would not grant relief where the hearing was bound to fail, because it is a general principle that discretionary relief is not granted where it would be futile or inutile. He relied on *Malloch* at 1595. I think that that argument is probably correct, but it really does not arise, in my view, because at an anterior point I have held good the argument that no error of law on the face of the record has been shown.[5]

Counsel for Mr Murdaca contended that the test to emerge from these passages was that whether a new application should be entertained depended upon whether the application for a rehearing was bound to fail. I do not think that to be the correct conclusion to be drawn from what was said by his Honour nor do I think it accords with sound policy in judicial administration.

7. The guiding test for the appropriateness of fresh applications seeking the same thing as had previously been rejected is whether the subsequent application amounts to an abuse of process. It is in that context that decision makers look to such matters as proof of fraud in the earlier decision or to the existence of fresh evidence that might require a different outcome from that previously reached. A party may have an entitlement to make an application more than once, but to exercise that right may be an abuse of the Court's process where the outcome can be expected to be the same. To justify the making of the same application again (that is, to justify a Court invoking the same process a second time) there must be something in the second application that may be thought to bear rationally and probatively upon the outcome that could make a difference. Whether a separate application may otherwise be bound to fail might be thought, analytically and as a matter of logic, to be an insufficient explanation for not embarking upon an enquiry which, as the reason would suggest, would, once embarked, be rejected.

8. In this case the learned magistrate described the question for her to consider in these terms:

> The relevant question here is whether there is sufficient new material to justify a further application under s56A, otherwise the Court is effectively being asked to rehear the original application or review its earlier decision.

I do not think this to be a misstatement of the relevant test or principle by reference to which the new applications of the earlier rejected applications were to be considered. The use of the word "sufficient" is not to be understood as requiring any unauthorised threshold not found in the legislation but, rather, as no more than a reference to something else not previously before the Court that would bear upon the jurisdiction such as to warrant a new application on what had previously been decided. There may be "new material" filed in Court which on no view could bear upon the issue which the decision maker was called upon to determine once the jurisdiction was embarked upon. A new application made on the basis of something which was not previously available to the Court but which does not bear upon the outcome sought to be achieved would not be justified. It is in that sense that the learned magistrate must be understood as using the word "sufficient" preceding the words "new material". It was no more than a correct, convenient and shorthand way of expressing the same idea as that in *Guss*, namely, that for a second application to be brought there needed to be fresh "evidence, in the sense used in relation to admission of evidence in appeals".[6] That is, that the new material relied upon will bear upon the outcome sought in a way that is probative, relevant and admissible to the jurisdiction sought to be invoked. The new material needed to justify a second application must be "sufficient" in that sense, and I do not consider that the learned magistrate erred in law in her statement of the test to be applied.

9. It is next relevant to ask whether the learned magistrate erred in application of the test. In this respect the learned magistrate had available a hand-up brief including a number of statements. The learned magistrate said immediately after the passage I have quoted above:

> I note that the witnesses sought to be examined in this application are the same witnesses as in the earlier application. I have read the hand-up brief which has been served. It contains a lengthy affidavit for Mr Murdaca involving allegations as detailed in the earlier affidavits supporting the earlier application.
>
> A number of statements have been included in the hand-up brief. In my view these statements contained large amounts of hearsay evidence which is not admissible in criminal proceedings. Further, the content of many of those statements contains very little relevant and admissible material. I am not of the view that the service of the hand-up brief amounts to sufficient new material to grant this application. In substance it amounts to the same facts and circumstances relied on in the earlier proceedings and, accordingly, the application is refused.

A number of complaints were made about this passage which led to extensive debate in the hearing before me.

10. The Magistrates' Court's power to order compulsory examination under s 56A is conditioned upon it being "satisfied that it is in the interests of justice" to make an order requiring a person to attend before the Court for the purpose of being examined by or on behalf of the informant or to produce a document, a thing or both. The section provides a coercive investigatory power to compel persons to be examined or to produce documents or things who would otherwise be reluctant to assist with investigations.[7] It is not a power to be exercised merely upon request but, rather, requires an applicant to satisfy the Court that the order should be made because it is in the interest of justice that it should be made. The power to compel questioning is not given to the informant; rather it is given to a Court upon application and by reference to the interests of justice. It may be thought that placing the power in the Court was intended to provide a safeguard against the inappropriate use of the coercive power created by the section. The applicant has a duty to satisfy the Court that it is appropriate that the order sought should be made. In discharging that duty it will ordinarily be desirable for the applicant to show the relevance of the evidence sought to be obtained to the proceeding. In that regard it may be necessary to show the scope and purpose of the proposed questioning and to explain how the questioning relates probatively (that is, how it will or may have effect in and upon) the facts in issue. The duty upon an applicant to satisfy the Court that it is in the interest of justice for the application to be granted is particularly significant when it is borne in mind that the defendant to a proceeding in respect of which an application

under s 56A is made is not a party to the application, may not cross-examine the witness, may not address the Court on the application and, although he or she may attend the proceeding, may only address the Court if it determines that there are exceptional circumstances. The possibility of a misuse of s56A, and the absence of a controverter in such an application, are matters which add to the conclusion that applications should not be granted lightly.

11. It is the applicant for an order under s56A who bears the burden of satisfying the Court that it is in the interest of justice to make the order sought. It is also the applicant for a fresh application under s56A who bears the burden of establishing that there is something which justifies the jurisdiction previously exercised being reengaged. To discharge that burden the applicant will need to focus with care upon what material is new in the specific sense that it bears upon the justification for a reconsideration of something previously decided. The learned magistrate was not satisfied on the "new" material placed before her that it justified a different outcome after she examined it and heard submissions. There were no submissions to the learned magistrate about how any particular part of the "new" evidence bore in any probative, relevant or admissible way upon the specific applications made under s56A. It may be accepted, as counsel put to me, that much of the material was probative, relevant and admissible in the private prosecution for perjury. Indeed, that appears to have been the way in which the matter had been put to the learned magistrate. She observed that the prosecutor in the proceedings before her had submitted that there were new facts and circumstances found in the hand-up brief and that "the prosecution now has a strong foundation for the application". It was said to me from the bar table, and it was also set out in the affidavit by Mr Murdaca, that the additional material had been filed to address the way in which the first application was understood to have been rejected. The first application appears to have been rejected on the basis that it was a fishing exercise based upon Mr Murdaca's general statements and assertions without support of additional evidence from others or documents. The material in the hand-up brief appears to have been directed to show the foundation for the prosecution but was not directed in any meaningful way (if at all) to satisfy the magistrate that the interest of justice required an order that certain persons attend for the purpose of being examined or to produce documents or things.

12. I was taken to several parts of the material which had been available to the learned magistrate in support of the proposition that an order should have been made. None of the material to which I was referred, however, in any way bore upon whether the orders under s56A should have been made. I was taken to passages which it was submitted showed that the case against the defendants in the private information had foundation. That may be accepted for present purposes but of itself is insufficient to determine whether orders contemplated by s56A should be made. Indeed, on one view, the strength of a case without the need to make an order under s56A might be thought to tell against the making of such an order. It is in that context that the observations made by the learned magistrate are to be understood. Her Honour was being asked to consider a fresh application under s56A and concluded that she had not been satisfied that the material relied upon had established something "new" upon which it could be granted. It is hardly a surprising conclusion in the context of proceedings where material was filed in an unstructured and unhelpful way without any attempt to establish how any part of it satisfied the requirement upon which the renewed exercise of jurisdiction depended. The "new" material neither established why an order under s56A should be made nor (assuming that there may be any practical difference in this case) did it establish that the application previously decided should be reconsidered. The learned magistrate's observations about the material containing inadmissible hearsay statements and the statements containing little relevant inadmissible material are, in my view, accurate descriptions of much of the material as filed. The learned magistrate was not ruling inadmissible or irrelevant any part of the material for the purposes of the application before her but, rather, was describing the material which had been provided to her. What was wholly lacking before her, and in the proceeding before me, was any successful discharge of the burden upon the applicant to show how any part of the material bore upon the statutory task required by s56A to be undertaken. The material may have been directed to show that the prosecutions had foundation, but the material (however described) was not shown to bear upon whether the jurisdiction previously exercised adversely to Mr Murdaca should be reinvoked. Accordingly, I reject the application.

13. It is not necessary for me to consider an issue that was raised in the proceedings about who should be heard at any hearing in this Court for judicial review. The defendant in the

proceeding before me was the Magistrates' Court although it ultimately made no application to be heard and, in any event, had no real interest in the outcome. The defendants to the private prosecution were not a party to an application under s56A and for that reason were apparently not made a party to proceedings under Order 56. The persons sought to be examined pursuant to s56A were also not joined as parties to the judicial review proceedings in the Supreme Court. This meant, therefore, that the Court was faced with having to decide an application for judicial review without hearing from the parties with a real interest to contest the orders sought by Mr Murdaca. It is, of course, undesirable for the interests of parties to be affected without hearing from them.[8] I express no view on whether either the defendant or the persons sought to be examined could or should have been joined to proceedings in this Court for judicial review. That issue did not arise for my consideration, although I note that judicial review under Order 56 is a fresh proceeding and not an appeal from a decision under s56A of the Act. The primary decision maker will ordinarily not be an appropriate party or controverter to such a proceeding[9] but it may be desirable for an appearance through counsel to make such submissions as might assist the Court even as controverter[10] where, as here, there was no other party, the Attorney-General did not intervene, and no public official or law officer was otherwise heard in the proceeding.

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[1] *Murdaca v Magistrates' Court of Victoria* (Unreported, Supreme Court of Victoria, Court of Appeal, Neave JA and Williams AJA, 23 March 2009).
[2] *Brygel v Stewart-Thornton* [1992] VicRp 70; (1992) 2 VR 387, 391; (1992) 67 A Crim R 243 (JD Phillips J); *Rich v Magistrates' Court of Victoria* [2007] VSC 65, (Unreported, Maxwell P, 9 March 2007) [7]; see also *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194, 227-9; (2000) 174 ALR 585; (2000) 74 ALJR 1348; (2000) 21 Leg Rep 14; (2000) 99 IR 309 (Kirby J).
[3] [1998] 2 VR 113.
[4] Ibid 123.
[5] Ibid 124.
[6] Ibid 123.
[7] *Harvey v County Court (Vic)* [2006] VSC 293; (2006) 164 A Crim R 62, 77 (Hollingworth J).
[8] *Annetts v McCann* [1990] HCA 57; (1990) 170 CLR 596; 97 ALR 177; (1990) 65 ALJR 167; 21 ALD 651; *Ainsworth v CJC* [1992] HCA 10; (1992) 175 CLR 564; (1992) 106 ALR 11; (1992) 66 ALJR 271; 59 A Crim R 255; *Jarratt v Commissioner of Police* [2005] HCA 50; (2005) 224 CLR 44; (2005) 221 ALR 95; (2005) 79 ALJR 1581; (2005) 145 IR 194; [2005] Aust Contract Reports 90-218.
[9] *R v Australian Broadcasting Tribunal; Ex parte Hardiman* [1980] HCA 13; (1980) 144 CLR 13, 35-6; 29 ALR 289; (1980) 54 ALJR 314 (Gibbs, Stephen, Mason, Aickin and Wilson JJ).
[10] *Fagan v Crimes Compensation Tribunal* [1982] HCA 49; (1982) 150 CLR 666, 681-2; (1982) 42 ALR 511; 56 ALJR 781 (Brennan J).

APPEARANCES: For the plaintiff: Mr J Levine, counsel. Cornwall Stodart, solicitors. For the defendant Magistrates' Court of Victoria: Mr BM Ihle, counsel. Victorian Government Solicitor's Office.
