

24/02; [2002] VSC 364

SUPREME COURT OF VICTORIA

CHEREMNOV v MAGISTRATES' COURT and ORS

Smith J

26, 30 August 2002

PRACTICE AND PROCEDURE – RETURN OF SUB-POENA TO CHIEF COMMISSIONER OF POLICE TO PRODUCE DOCUMENTS – DOCUMENTS SOUGHT BROUGHT TO COURT BY POLICE PROSECUTOR – AGREEMENT BY PROSECUTOR TO PRODUCE SOME OF THE DOCUMENTS SOUGHT – OBJECTION BY PROSECUTOR TO THE RELEASE OF REMAINING DOCUMENTS – OBJECTION BY DEFENDANT THAT PROSECUTOR HAD NO STANDING IN THE MATTER OF THE SUB-POENA – DECISION BY MAGISTRATE THAT CHIEF COMMISSIONER SHOULD BE GIVEN THE OPPORTUNITY TO APPEAR TO PRESENT SUBMISSIONS ON THE MATTER – PROCEEDING ADJOURNED ON MAGISTRATE'S OWN MOTION – WHETHER MAGISTRATE IN ERROR.

A sub-poena addressed to the Chief Commissioner of Police sought that certain documents be produced to the court. The police prosecutor who appeared on behalf of the informant indicated that some documents would be produced but opposed the production of other documents sought. The defendant's counsel submitted that the prosecutor had no standing with respect to challenging any aspect of the sub-poena and had no instructions to challenge the sub-poena. After hearing submissions in the matter the magistrate stated that the Chief Commissioner of Police should be given the opportunity to appear to present submissions and on his own motion adjourned the proceedings. Upon an originating motion to quash—

HELD: Application refused.

The absence of an application to adjourn the return of the sub-poena did not prevent the magistrate adjourning the proceedings. The magistrate had power under s128 of the *Magistrates' Court Act* 1989 to adjourn the sub-poena on his own motion. Having information before him that the person sub-poenaed opposed the sub-poena, the magistrate could not ignore that information. It would have been a denial of natural justice to press on and order the police prosecutor to produce the documents without giving the Chief Commissioner of Police an opportunity to be represented. The decision of the magistrate to adjourn was a practical and prudent solution which was likely to minimise the wastage of the court's time and the parties and it also protected the positions of the relevant parties and avoided any prejudice.

SMITH J:

The Proceedings

1. By originating motion filed 23 April 2002, the plaintiff, Larry Cheremnov, seeks a wide variety of orders arising out of a decision in the Magistrates' Court at Frankston on 2 April 2002 to adjourn the return of a subpoena addressed to the Chief Commissioner of Police to 24 April 2002 and reserving the costs of the adjournment. The subpoena was issued by the plaintiff in criminal proceedings brought against him under the *Road Safety Act* 1986.

2. The orders sought in these proceedings are, in essence:

(a) relief in the nature of *certiorari* quashing the above decision;

(b) relief in the nature of *mandamus* directing the Magistrates' Court to order production of the documents the subject of the subpoena and access to the documents for inspection by the plaintiff;

(c) an order directing the second defendant, the Chief Commissioner of Police, to produce the documents subpoenaed and an order giving access to those documents for the purpose of inspection;

(d) a series of declarations

(i) that the documents in Court in response to the subpoena should have been produced to the Court or their production ordered by the Court;

(ii) such documents should have been released to the plaintiff for inspection in the absence of any application to the contrary by the second named defendant, the Chief Commissioner of Police;

(iii) the police prosecutor who sought to appear on behalf of the informant being the third named

defendant, being a stranger to the subject matter of the subpoena had no *locus standi* or right at law to appear on behalf of the secondnamed defendant or make submissions on her behalf or refused to produce documents on the return date of the subpoena being 2 April 2002 and which were in fact in court and "presumably produced by the secondnamed defendant in conformity with the subpoena";

(iv) that the police prosecutor, who sought to appear on the return date of the subpoena, had no *locus standi* or right at law to oppose production of the documents sought in the subpoena without clear instruction of the Chief Commissioner of Police to do so or to appear on her behalf and that in so far as he did seek to oppose production of the documents which were in fact in court "presumably in answer to the subpoena" that such actions amounted to an abuse of process or were otherwise wrong in law.

3. In addition, a declaration is sought that the learned magistrate's actions in:

(i) failing or refusing to rule upon the submissions of the plaintiff that the police prosecutor had no *locus standi* or right at law to appear on behalf of the second defendant or make submissions on her behalf; and/or

(ii) directing an adjournment to give the second named defendant a right to consider her options in respect to representation on the return of the subpoena; and/or

(iii) such adjournment being directed in the absence of any party appearing on behalf of the second defendant or any party in fact requesting such adjournment; and/or

(iv) refusing to order production of the documents the subject of the subpoena which were in fact in court; and/or

(v) refusing to release the said documents to the plaintiff for inspection; and/or

(vi) refusing to grant an order for costs to the plaintiff thrown away as a result of directing such an adjournment constitute a "denial of natural justice and/or a refusal to exercise a jurisdiction and/or procedurally unfair and/or biased and/or an abuse of process and/or was otherwise wrong at law".

4. Finally, an order is sought in the nature of prohibition against the Magistrates' Court from proceeding to hear and determine the charge and summons filed on 11 April 2000 and laid against the plaintiff under s49(1)(b) and s49(1)(f) of the *Road Safety Act* 1986 by the third named defendant, and from fixing a date for the hearing of the charges until production of the documents sought by the plaintiff referred to in the subpoena.

Approach to the Application

5. It seems to me that on discretionary grounds alone the application should be refused. There is nothing unfair in what occurred below and what is sought is a fragmentation of the primary proceedings.^[1] It is desirable, however, that the arguments advanced addressing the merits be considered. To that end, I propose first to outline what occurred below and then consider the arguments that have been put.

The Proceedings Below

6. On 11 April 2000, a charge and summons was brought by the third defendant against the plaintiff under ss49(1)(b) and 49(1)(f) of the *Road Safety Act* 1986. On 25 July 2000, the plaintiff issued a subpoena directed to the Chief Commissioner of Police. This was served on 2 August 2000. This subpoena was returnable on 21 August 2000 but the return date was adjourned pending the outcome of a decision in what is described as *Fitzgerald's* case. That decision was handed down on 19 December 2001. The Registrar of the Magistrates' Court then listed the return of the subpoena for 2 April 2002.

7. On 2 April 2002, the matter was called on before the Magistrates' Court. sSenior Constable Mark Ridgeway, who was the prosecutor in the principal proceedings, informed his Worship that he had contacted the solicitors for the plaintiff to determine the plaintiff's position in light of the decision. In addition, clarification was sought about the position of the plaintiff on another issue — whether counsel for the plaintiff, Mr Billings, intended to contest Senior Constable Ridgeway's "standing" to appear to challenge the subpoena. On 28 March 2002, Senior Constable Ridgeway spoke to Mr Billings who indicated that that issue would be contested. Senior Constable Ridgeway

then contacted Ms Pavlou of the Victorian Government Solicitors to arrange for a barrister to appear at the hearing of the return of the subpoena on behalf of the Chief Commissioner of Police. These conversations occurred immediately prior to the Easter break. He informed the learned magistrate that Ms Pavlou had been unable to obtain counsel to appear on 2 April 2002, the Thursday after the Easter break.

8. Mr Billings, who appeared for the plaintiff below, informed the learned magistrate that the documents asked for, as he understood it, were in court and he asked for them to be produced in accordance with the subpoena and to be released to himself with the usual undertaking. After some preliminary discussion, his Worship announced he thought that it would be more appropriate to stand the matter down so that Senior Constable Ridgeway and Mr Billings could discuss what matters were to be contested and what documents he wished to hand over and what documents he did not wish to hand over. Mr Billings went along with that suggestion.

9. On the resumption of the hearing, Mr Billings announced that Senior Constable Ridgeway had consented to give him a copy of the interview register, referring at the same time to possible issues about the production at the trial of the original of that document. Senior Constable Ridgeway indicated he was happy to give an undertaking to produce the original if Mr Billings was conceding that he had standing in the Court to do so. He stated that he believed there might be an issue with Mr Billings that he had no standing in the Court. Mr Billings stated that all that had happened was that the documents, presumably the interview register documents, had been agreed to be produced to the Court and then released to Mr Billings by agreement between him and Senior Constable Ridgeway but he submitted that Senior Constable Ridgeway did not have standing with respect to the issue of the subpoena. The learned magistrate questioned that proposition, suggesting that Senior Constable Ridgeway would be entitled to make submissions on behalf of the Chief Commissioner as to what documents ought or ought not be handed over under the subpoena.

10. Mr Billings developed his argument further. He said that the informant was represented by a prosecutor pursuant to s38(c) of the *Magistrates' Court Act* 1989. He submitted also that the Chief Commissioner of Police was a third party in those proceedings and that the subpoena was a separate and distinct issue in those proceedings. He submitted that the police prosecutor had no standing with respect to challenging any aspect of the subpoena because he was given no standing at law. He said that if the Chief Commissioner wished to challenge any aspect of the subpoena then the Chief Commissioner had to be represented, but she could not be represented by a police prosecutor who appeared on behalf of an informant. He then submitted that if the Chief Commissioner was not represented then the Court had to receive the documents which, as it happened, were in Court and in the custody of a police officer holding those documents on behalf of the Chief Commissioner who has presumably produced those documents to the Court in accordance with the subpoena and without challenge. He advanced the suggestion that what had occurred here had occurred, in his experience, on other occasions when the Chief Commissioner answered a subpoena without challenge and produced the documents to the Court and "then some prosecutor gets their hands on the documents and refuses access to them upon their own whim and fancy, without such instructions from the Chief Commissioner". He submitted that the prosecutor appeared to be doing the same thing. He submitted that the prosecutor had no instructions to challenge the subpoena.

11. The learned magistrate then asked Senior Constable Ridgeway if he had instructions on behalf of the Chief Commissioner in the matter. He replied:

"My understanding is I am asked to appear and to oppose a subpoena. I am willing to make concessions on behalf of that, and the concession I am willing to make is we will hand over the documents to (sic) the attendance register."

He then commented, as best as one can gauge from the transcript, that the subpoena was a fishing expedition and that for that reason he was bound to oppose the application.

12. Mr Billings then seized on the opening words "My understanding is ..." to suggest that Senior Constable Ridgeway had not answered his Worship's question. He said further that in any event, if he had instructions, he still had no standing in law. His Worship then suggested that

perhaps the option to follow was not to hear the matter. This was resisted by Mr Billings who again argued that it was inappropriate not to hear the matter on its merits. He submitted that the Chief Commissioner was on notice by service of the documents and had chosen not to oppose the subpoena and there was no party there with standing to make an application for an adjournment. He submitted it was inappropriate to adjourn the matter of his Worship's own volition under the circumstances and that to do so would indicate a preference for the prosecution.

13. In further submissions, Mr Billings argued, *inter alia*, that the Chief Commissioner had been given every opportunity to consider her options and had chosen not to be represented and that the prosecutor was not a representative of the Chief Commissioner of Police and had no standing in the proceeding. Counsel referred on the latter point to the case of *Re ACI International Limited* (1986) 11 ACLR 240 and provided his Worship with a copy of that decision. In essence, counsel submitted that the only standing the prosecutor had was that given on behalf of the informant pursuant to s48(c) of the *Magistrates' Court Act* 1989, that the informant was not a party to the subpoena proceedings and the Chief Commissioner of Police was a third party to the criminal proceedings who was not represented. He further submitted that the prosecutor had no standing to object to the subpoena and no right to refuse to produce the documents to the Court. He submitted the documents should be produced to the Court forthwith.

14. In response, Senior Constable Ridgeway outlined the matters referred to above about attempting to find out from the lawyers acting for Mr Cheremnov as to what his position was on the subpoena. He referred to *Fitzgerald's* case, in which Mr Billings had also apparently appeared, where, according to Senior Constable Ridgeway, there was a ruling against the operation of the subpoena in so far as it affected documents of the kind sought in the current subpoena on the basis that it was a fishing expedition. This submission was disputed by Mr Billings who submitted that the prosecutor could not make submissions in relation to the subpoena because he had no standing to make such submissions. He also submitted that he had no status to make enquiries about the plaintiff's requirements as to the documents, that that was a matter for the Chief Commissioner or her representative. He commented that the prosecution had gone off on a journey of its own of which the Chief Commissioner knows nothing and yet she produced the documents in conformity with the subpoena. He submitted that Senior Constable Ridgeway had no right to speak for the Chief Commissioner or make enquiries and was being obstructive. Senior Constable Ridgeway subsequently, amongst other things, gave more details about his attempts to obtain legal representation for the Chief Commissioner. He submitted that the Chief Commissioner had not had an opportunity to be heard on the subpoena. He relied upon s136 of the *Magistrates' Court Act* 1989 which he submitted allowed the Court to "virtually direct how they want the proceedings to run". He also submitted, *inter alia*, that if his Worship ruled against him as to his standing to appear for the Chief Commissioner on the return of the subpoena then the learned magistrate could invite him to comment on the matter. He also stated that if his Worship was against him then he would ask for the matter to be stood down to enable representation to be organised for the Chief Commissioner.

15. The debate continued before his Worship, with Mr Billings making submissions about the distinction between inviting comment and making submissions. He continued to assert that the Chief Commissioner had produced the documents without challenge at law and had taken her chances on the legal issue of standing and could always challenge his Worship's ruling in another place. He submitted that nothing the prosecutor had said "even remotely suggests that he has instructions from the Office of the Chief Commissioner". Senior Constable Ridgeway responded with further submissions on the issue of "standing".

16. At the conclusion of argument his Worship indicated he would adjourn the matter to consider his ruling. Before he did so, however, according to the affidavit filed for the plaintiff, the learned magistrate said,

"Perhaps the Chief Commissioner has had no time to consider whether or not to be represented, and the Senior has made comments with respect to that."

17. According to the same affidavits Mr Billings replied,

"He has, but it is disturbing that the prosecutor can say from the Bar table that the fact that I have submitted that the Chief Commissioner has had more than sufficient notice to challenge the subpoena,

and the fact that we have even persisted with our application, is described by him indirectly or by inference as a non-event. Neither myself or my instructor have ever deviated from our course in seeking the documents. The prosecutor knew that or should have known. It is a nonsense to leave his enquiries to the last minute, when there was a mention well after *Fitzgerald* was decided and then blame the defendant's legal adviser. It is also a nonsense to suggest that no member of counsel could be found to be briefed. Courts have often made adverse comments about such a plea. I have come here today prepared to run my case if the Chief Commissioner was represented or not represented. We have never changed our minds about that."

18. After some further comments and submissions, the learned magistrate then left the Bench. He was wise to do so, the arguments advanced for the plaintiff being difficult to follow. He returned and delivered a ruling in the following terms:

"With respect to the subpoena in this matter, Mr Billings has submitted the prosecutor has no standing to object to the production of documents referred to in the subpoena issued to the Chief Commissioner requiring his attendance in this court on 21 August 2000. In support of such, he referred me to a decision of Mr Justice Beach in *Re ACI International Limited* (1986) 11 ACLR 240 and in particular with respect to the last paragraph on p2 thereof and the first — and in the bulk of the references and comments of Mr Justice Beach on p3 of that decision. It is submitted that the prosecutor does not appear on behalf of the Chief Commissioner and only appears on behalf of the informant pursuant to the provisions of the relevant legislation. The prosecutor stated that he believed that he had instructions to appear on behalf of the Chief Commissioner. He referred to authorities (indistinct) in *Nash* ... at 3-469 ... which includes a number of authorities including that referred to by Mr Billings. In that decision of Mr Justice Beach ... the passage Mr Billings referred to, states that: 'A person to whom a subpoena is addressed, seeks to have it set aside on the ground that it was improperly issued, it is for the witness to raise that matter for determination by the courts and in that regard he may be represented by counsel or a solicitor ...'. It does not follow that a Judge cannot invite comment from opposing party if the circumstances are such that he considers he may be assisted by such comment. All I'm saying is that I do not consider an opposite party has the right to be heard on the matter'. He also refers to a decision of Mr Justice McLelland ... but in doing so his Honour relied on specific terms referred to in the New South Wales Supreme Court Rules The prosecutor has also referred to the telephone conversations with the defendant's solicitors last week and with Mr Billings or his office on Thursday morning last, and to the subsequent conversations he had with the police legal advisers in an attempt to engage legal representative at 5.30p.m. on Thursday last, to no avail. With Easter intervening, today is the first working day after Thursday last. The prosecutor stated that as a result of *Fitzgerald's* case it was considered the issues and matters referred to in the subpoena returnable in August 2000 were a non-issue. However, it ought to become apparent that such was not the case, particularly after having discussion on Thursday morning with Mr Billings. In the circumstances, (indistinct) the opinion without determining the issue that some doubt appears as to the right of the prosecutor to appear on behalf of the Chief Commissioner, however I consider the Chief Commissioner ought be given the opportunity to appear to present submissions in this matter, particularly having regard to the history of this matter and what occurred on Thursday last. Accordingly, I propose to adjourn further hearing of this submission for one to two weeks depending on the availability of counsel and to give the Chief Commissioner, if he so desires, an opportunity to engage representation on his behalf (indistinct) to adjourn the matter for approximately two weeks."

Thus, in essence, without ruling on the question of whether Senior Constable Ridgeway could represent the Chief Commissioner at the return of the subpoena, his Worship concluded that in all the circumstances the matter should be adjourned to give the Chief Commissioner, if she wished, an opportunity to appear with legal representation to respond to the subpoena. He went on to reserve the question of costs.

The Issues

19. The originating motion sets out a lengthy statement of "grounds" but the argument advanced for the plaintiff came down to three issues. Before turning to those issues I note that the secondnamed defendant was content to allow the matter to be determined on the basis that the Chief Commissioner could not be represented by the police prosecutor. That issue, however, is not otherwise conceded. I express no view on it.

(a) Absence of application to adjourn and resulting obligation to order production

The first argument raised was that in the absence of an application by the Chief Commissioner to adjourn the return of the subpoena, the magistrate should not have done so and ought to have released the subpoenaed documents that were in court to the defendant.

The absence of an application to adjourn did not prevent his Worship adjourning the proceedings. He had power under s128 of the *Magistrates' Court Act* 1989 to adjourn the subpoena on his own motion.

As to the decision to adjourn and not release the documents, his Worship was faced with the situation where a point had been raised by the party that had issued the subpoena questioning whether Senior Constable Ridgeway could appear for the Chief Commissioner in response to the subpoena. If this argument was correct, there was no-one who could respond in court to the subpoena and, in particular, no-one who could be called on to produce the documents to the Court. Thus the subpoena had to be adjourned or steps taken to enforce its compliance.

His Worship, in any event, also had information from Senior Constable Ridgeway, who purported to be answering the subpoena for the Chief Commissioner, that the Chief Commissioner wished to oppose the subpoena. Senior Constable Ridgeway had also explained to him his unsuccessful attempts to obtain legal representation for the Chief Commissioner of Police. Having information before him that the person subpoenaed opposed the subpoena, he could not ignore that information. It would have been a denial of natural justice to press on and order Senior Constable Ridgeway to produce the documents without giving the Chief Commissioner of Police an opportunity to be represented in the manner in which the plaintiff alleged was lawful.

Counsel submitted that the adjournment in the circumstances prejudiced the rights of the plaintiff and ought not to have occurred. The only "prejudice" caused to the plaintiff was that he was deprived of the opportunity of having access to the documents there and then without further argument, that result being achieved by depriving the Chief Commissioner of Police of the opportunity to be heard. His Worship adopted the practical and prudent solution of adjourning the subpoena and reserving costs. This was likely to minimise the wastage of time of the Court and the parties on the issue about whether Senior Constable Ridgeway could represent the Chief Commissioner of Police. It also protected the positions of the relevant parties and avoided any prejudice.

(b) Consideration of irrelevant matters

The next issue raised is that the learned magistrate acted on matters that were not material in determining to grant the adjournment. The reason for the adjournment, it was said, was to allow the Chief Commissioner to arrange other representation if he wished to do so. Counsel relied on *Aherne v Freeman* [1974] VicRp 17; [1974] VR 121, 127. The circumstances of that case are not relevant. The principle for which it is cited, that an adjournment should be granted on material considerations only, does not require authority to support it. I have already referred to the considerations taken into account. They were relevant.

(c) The Magistrate erred in considering the matters raised by the prosecutor

Finally, it is put that the learned magistrate took into account, in deciding whether to adjourn the subpoena, the matters submitted to him by Senior Constable Ridgeway and that they should not have been considered because Senior Constable Ridgeway had no right to represent the Chief Commissioner of Police. The argument appears to involve the proposition that when matters were brought to the attention of the learned magistrate he should ignore them because the person who brought those matters to his attention was not authorised to represent the Chief Commissioner of Police.

The decision made by his Worship did not determine the rights of the parties. The magistrate merely adjourned the return of the subpoena, reserving costs, because of the matters that had been brought to his attention. I find it a remarkable proposition that when a person attends court purporting to answer a subpoena addressed to another and indicates to the Court that that other person opposes the subpoena but his authority is challenged, the Court should not be prepared to give the person subpoenaed the opportunity to obtain proper representation while preserving the position of the party who issued the subpoena by reserving costs.

In any event, the plaintiff cannot be heard to argue that Senior Constable Ridgeway did not have authority to convey the information to the Court. It will have been noted from what I have outlined above that counsel for the plaintiff conducted himself before the magistrate in such a way as to accept, *inter alia*, that Senior Constable Ridgeway had authority from the Chief Commissioner to:

- (a) inform the Court that he was answering a subpoena directed to the Chief Commissioner,
- (b) bring the documents subpoenaed into court and
- (c) negotiate with counsel as to the production or otherwise of documents subpoenaed.

Counsel elected to treat Senior Constable Ridgeway as having the above authority. If he had that authority he also had authority to inform the Court of the response of the person subpoenaed. Counsel cannot be heard to argue, having made that election, that Senior Constable Ridgeway did not have authority to inform the Court that the person subpoenaed opposed the production of the documents.

The further argument was put, following on the above argument, that the magistrate should have proceeded on the basis that there was no objection from the Chief Commissioner of Police and, therefore, that he should have permitted inspection of the documents. Again there is a fundamental inconsistency in the argument. It assumes that the documents before the Court were produced by the Chief Commissioner of Police through Senior Constable Ridgeway, yet it is said that, notwithstanding that that fact can only be established by relying upon what Senior Constable Ridgeway said and his authority to do so, the magistrate should have ignored what Senior Constable Ridgeway said was the Chief Commissioner's position because he did not have the necessary authority. Alternatively, if the argument of the plaintiff is accepted, his Worship could not determine what the response was to the subpoena and could not proceed on the basis that any documents were produced by the Chief Commissioner because Senior Constable Ridgeway did not have authority to respond to the subpoena on behalf of the Chief Commissioner.

Conclusion

20. The plaintiff's arguments before both Courts show remarkable chutzpah. They are without merit. The application to this Court should never have been brought. It should be dismissed.

[1] *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564 at 597; (1992) 106 ALR 11; (1992) 66 ALJR 271; 59 A Crim R 255, per Brennan J citing Lord Hailsham in *Chief Constable of North Wales Police v Evans* [1982] UKHL 10; [1982] 3 All ER 141; (1982) 147 JP 6; [1982] 1 WLR 1155 at 1172; *Stefanovski v Murphy* [1996] VicRp 78; (1996) 2 VR 442 at 451; *Harland-White v Gibbs and Ors* [1993] VicRp 70; [1993] 2 VR 215 at 217-8.

APPEARANCES: For the plaintiff Cheremnov: Mr S Hardy, counsel. Hill Legal, solicitors. For the second and third defendants: Mr B Dennis, counsel. Victorian Government Solicitor.
