32/04; [2004] VSC 396

SUPREME COURT OF VICTORIA

ONUS v SEALEY

Kaye J

11 June, 8, 14 October 2004 — (2004) 149 A Crim R 227

NATURAL JUSTICE – CRIMINAL PROCEEDINGS – REQUEST BY SOLICITOR IN WRITING FOR ADJOURNMENT OF CASE FOR FURTHER MENTION – DEFENDANT APPEARED IN PERSON – DEFENDANT GIVEN EXTRA CHARGE OF CRIMINAL DAMAGE ON APPEARANCE AT COURT – MATTER STOOD DOWN BY MAGISTRATE FOR DEFENDANT TO CONSULT COURT LAWYER – MATTER NOT ADJOURNED AS REQUESTED – UPON RESUMPTION DEFENDANT PLEADED GUILTY TO CHARGES AND WITHOUT CONVICTION RELEASED ON A BOND – SPECIAL CONDITION TO PAY AN AMOUNT FOR COMPENSATION – WHETHER DEFENDANT DENIED NATURAL JUSTICE BY REASON OF NON-ADJOURNMENT OF MATTER.

Some time prior to the hearing of charges against O., O's solicitor wrote to the Magistrates' Court seeking an adjournment of the charges for further mention. When the matters came on for hearing, O. appeared without a legal representative. O. was given an extra charge of criminal damage by the prosecutor. After discussion with the magistrate, the matter was stood down and O. consulted a court lawyer. Upon resumption, O. told the magistrate that she consented to the charges being heard in the Koori Court Division of the court. The case proceeded and subsequently O. was released on an undertaking without conviction with the condition she pay the sum of $1791.35 compensation by way of instalments. Upon appeal—

HELD: Appeal allowed. Orders set aside. Remitted for re-hearing.

1. There are two fundamental requirements of the rules of natural justice. First, an accused person must have a reasonable opportunity to know the case against him/her, and to make answer to that case. Secondly, an accused is entitled to have the charges heard free of actual or apprehended bias on the part of the presiding magistrate. In the present case the appellant relied on the proposition that the magistrate conducted himself in a manner which gave rise to an appearance of bias.

2. In this case the magistrate did not expressly refuse to grant an adjournment. Rather, after the defendant requested an adjournment, the magistrate discussed the matter with her, and then stood the matter down to enable the defendant to consider whether she wished to plead not guilty, in which case the matter would need to be adjourned. However, the fact remained that the defendant had initially clearly signified that she wished to plead not guilty, and that she considered that she was not guilty of the three assault charges. She had only just been served with the charge of intentionally causing damage to property under s197(1) of the *Crimes Act*. She was an 18 year old Aboriginal girl with no prior convictions and no previous court experience. She had sought the advice of a solicitor, who wished to make further enquiries before advising his client as to the course which she should adopt. At the time of coming to court the defendant did not have a copy of the police brief. In those circumstances it was clear that the defendant did not have an opportunity to properly consider the charges brought against her, and to seek proper advice as to what course she should take in respect of them. She was within her rights in seeking the adjournment; under s39 of the *Magistrates' Court Act* 1989, the court was required to adjourn the matter if requested by the defendant, if the court was satisfied that the defendant had not had a reasonable opportunity to obtain legal advice.

3. In the circumstances it behoved the magistrate to adjourn the proceeding to a further date in order to enable the defendant to obtain legal advice and, if she so desired, to properly prepare a defence to the charges which had been brought against her. The conduct of the proceedings before the magistrate was productive of an injustice to the defendant, by being deprived of the opportunity to seek and obtain legal advice, and, if she so desired, to contest the charges which had been brought against her. Accordingly, there was a breach of the rules of natural justice based on the failure of the magistrate to accede to the defendant's application for an adjournment, and based on the magistrate's proceeding to take a plea from the defendant on the five charges, and to hear and determine the submissions in respect of the question of penalty.

KAYE J:

1. These are two appeals by Arika Onus, under s92 of the *Magistrates' Court Act* 1989, in respect of orders made by the Magistrates' Court at Portland on 21 January 2004.

Background

2. On 28 November 2003, the appellant was arrested. She was charged with three charges of assaulting police, and one charge of being found drunk in a public place. The appellant was bailed on her own undertaking to appear in the Magistrates' Court at Portland on 21 January 2004.

3. In the meantime, the appellant consulted a solicitor, Mr Gabriel Kuek, of Access Law. Mr Kuek advised her that he would obtain a copy of the police brief and investigate the matter on her behalf. On 19 January 2004, Mr Kuek wrote a letter to the Portland Magistrates' Court. In that letter Mr Kuek advised that he acted for the appellant, and that he was in the process of obtaining a copy of the police brief of evidence with a view to advising the appellant and discussing the matter with the police. The letter then stated, "In view of this we need an adjournment of the matter for further Mention." The letter further advised that the appellant was 18 years of age, resided in Melbourne, was of Aboriginal descent, and inexperienced with the court system. The letter requested that the prosecutor and the presiding magistrate give consideration to adjourning the matter for further Mention or contest Mention at the Melbourne Magistrates' Court.

4. On 21 January 2004, the appellant attended at the Magistrates' Court at Portland in compliance with the conditions of her undertaking of bail. Her father, Kelvin Onus, attended with her. A further charge, alleging that the appellant had intentionally and without lawful excuse damaged property of another contrary to s197(1) of the *Crimes Act*, had been filed on the previous day. That charge had not been served on the appellant before she came to court.

5. In due course the matter was called on for hearing before the presiding magistrate. A transcript of the proceedings before the magistrate on that day was tendered in evidence. Unfortunately, that transcript is not complete. There are passages which have not been recorded in the transcript and are identified, in parentheses, with the word "indistinct". At one stage the recording equipment failed.

6. After I heard submissions from counsel on 11 June 2004, it became apparent that important aspects of the proceeding, relevant to the appeals before me, may not have been set out in the transcript. Accordingly I acceded to the suggestion of Mr Holdenson QC, counsel for the respondent, to obtain a report from the magistrate pursuant to Rule 58.14 of the *Rules of the Supreme Court*; see *Lindgran v Lindgran*[1]; *Ewan v McMullen*[2]; *Buzatu v Vournatzos*[3]. The magistrate provided a report to which I shall refer later. His Worship's report indicated that indeed the tape of the proceedings which had been tendered before me, and which was quite difficult to decipher, may contain further passages which were not set out in the transcript, and which were significant to the determination of the issues before me. Accordingly, my associate arranged for Flagstaff Studios, sound engineers, to further enhance the tape and to provide any further transcript of it which was not provided in the original transcript. Flagstaff Studios has provided two reports, copies of which were provided to the parties, together with the magistrate's report. Unfortunately, because of the quality of the tape, it has still not been possible to obtain a complete transcript of the proceedings before the magistrate.

7. Having received those reports, the salient part of the proceedings, as set out in the transcript and supplemented by the reports, may be summarised as follows:

> (a) The matter was called on and the appellant was identified by the magistrate. The following exchange occurred between the appellant and the magistrate:
> "His Worship: What are you seeking to do in relation to this charge? You are charged with an offence of criminal damage in relation to property belonging to Deborah Sutherland. What are you proposing to do in relation - or what are you seeking in relation to this charge? Defendant: I seek more legal advice. His Worship: There is also charges of drunk and assault police, three charges. Is that so? Defendant: Yes. His Worship: Have you sought any advice up until now? Defendant: I have got a letter. His Worship: I have got a copy of that on the file."
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> (b) His Worship then identified the letter from Mr Kuek of Access Law. The learned magistrate stated that the letter indicated to him that the solicitor " ... doesn't quite understand how the legal system works, quite frankly, because he is seeking a transfer of the proceedings to Melbourne for a contest mention hearing. That's not the way it works." The magistrate then stated that the appellant was entitled to contest any of the charges she wished to, but if the matter was to proceed or if any of the charges were disputed, they had to be heard at the court where the offences were alleged to have

been committed. His Worship indicated that if the appellant pleaded guilty to all the charges and if it was more convenient to her, then the matters could be transferred to another court. However that could only be done if the appellant pleaded guilty to the charges. The magistrate also stated that if the appellant intended to plead guilty to the charges, it was open for her to have the matter dealt with by the Koori Court but that that could only occur in Portland and not transferring the matter to the Melbourne Magistrates' Court. His Worship then stated:
"These are clearly matters which you should consider and get some advice on. I will adjourn the matter for a short period of time to enable you to get some further legal advice."

(c) The magistrate asked for and was apparently handed by his clerk a copy of the police brief summary of charges.

(d) The magistrate, evidently referring to the summary, stated to the appellant that the allegation against her was that she was affected by alcohol and that she then engaged in conduct involving damage to another vehicle, and also then had an altercation with the police who attended the scene. His Worship asked the appellant whether she had been in trouble previously with the police. The appellant answered that she had not. His Worship stated:
"Well it is not for me to interfere with your right or wish to plead not guilty to any of the charges, although on the face of it, clearly if somebody is affected by alcohol and there appears to be witnesses to the various incidents which have occurred, including police officers which relate to the assault police charges, quite often it is difficult for somebody to successfully contest those charges, particularly if they have been affected by alcohol when they have acted in such a way. One of the things that any legal representative should advise you is that you are entitled to a discount and I must reduce the sentence or penalty that I would impose in relation to the charges, if you plead guilty. However, that of course, doesn't restrict you or prevent you in any way from wanting to contest the charges, if you think that that is appropriate and you may have a valid defence to the charges."

(e) The magistrate asked the sergeant, who was prosecuting the charges, whether he would be seeking to proceed with all of the assault police charges or whether they could be rolled into one charge. The sergeant responded that he had not had the opportunity to consider the matter. The magistrate told the appellant that he would stand the matter down to give her an opportunity to speak with others in the court precinct and have a think about what she would wish to do.

(f) Before the matter was stood down there occurred the following exchange:
"His Worship: I know that we haven't got to the stage of saying whether or not you are guilty or otherwise, but can you offer any explanation for your conduct on that night? Defendant: I was celebrating an eighteenth of mine and the VCE. I know that I didn't have an alcoholic drink two hours prior to the incident. The assault charges, I believe, I am not guilty of. His Worship: Alright, well that is a matter for you. My practice has been ordinarily where young persons appear before the court and where they don't have any prior history, they haven't been in any trouble previously, then unless there is good reason not to do so, that I don't record a conviction if, in fact, I deal with the charges and they plead guilty. As I say, nothing I say imposes upon you an obligation to plead guilty today if, in fact, you believe you have a valid defence. But I will stand the matter down, you can have perhaps an opportunity to speak to any people who may be at court, or assisting you today and then I will mention your case a little bit later on and you can indicate to me at that stage, if you want to plead not guilty, then I will have to adjourn the matter to a later date and you can get some further legal advice okay? Thank you."

(g) The magistrate's report states that after his Worship stood the matter down, the appellant had the opportunity to discuss the matter with her father, the court Aboriginal justice worker, and other members of the Koori community. She also spoke to Mr Pat Howman, a Portland solicitor, who was present at the court on that day.

(h) The court proceeded to hear other matters. The transcript then contains the following:
"His Worship: Yes Miss Onus, have you had an opportunity to consider what you might want to do in relation to these charges? Defendant: Yes, I wish to have the hearing heard in the Koori Court. His Worship: Yes, do you want that to happen today or do you want that to happen at some other time? Defendant: Today would be good. His Worship: I will stand the matter down. There is only a couple of other matters that we have got to attend to, and then we will deal with your matter by way of the Koori Court hearing, thank you."

8. The transcript records that at that stage the court proceeded with other matters. On the next line the transcript records, in parentheses, the words "equipment malfunction". On the next line the transcript (as supplemented by the reports of Flagstaff Studios) records the following:

"Clerk: The Koori Court at Portland is now open. Call the matter of Arika Onus.

Mr Howman: Your Worship, I've just been given a bit of general advice to try and assist. I'm just formally involved (indecipherable) told her what you indicated before may be a suggested outcome.
Magistrate: (Indecipherable) deal with the assault by way of one charge?
Prosecutor: (Indecipherable) well (indecipherable) your Worship there are three separate incidents and I won't be withdrawing them. (Flagstaff Studios noted that it could not understand this part of the tape.)
Magistrate: You understand (indecipherable) the matter (indecipherable) the Koori Court Division (indecipherable) and the fact you (indecipherable) charge (indecipherable) do you understand that?
Defendant: Yes.
Magistrate: You have now had the opportunity of speaking obviously with people who are with you at court today in relation to what your options are?
Defendant: Yes.
Magistrate: Now as I understand you intend to plead guilty to one charge of criminal damage (indecipherable) to the vehicle (Flagstaff Studios indicated it was unsure of this section) and charge in relation of assault police is that so?
Defendant: Yes.
Magistrate: This is the first sitting of the Koori Court Division of the Portland Court ... ".

9. The magistrate then stated that there were with him two respected persons in the community to assist him. He stated that he understood from Mr Walter Saunders, who was the Aboriginal Justice Worker, that he had spoken to appellant and obviously would provide the magistrate with some information.

10. The case proceeded before the Magistrates' Court sitting as a Koori Court division pursuant to ss4D to 4G of the *Magistrates' Court Act* 1989. In summary, the following occurred:

(a) the magistrate stated that he had read the summary, presumably referring to the summary of charges. The prosecutor set out brief details concerning the appellant's background.

(b) the magistrate asked the appellant if there was anything she wished to say in relation to the incident, and in particular in relation to the damage to the motor vehicle. The appellant's response to that question is not recorded on the transcript.

(c) the magistrate asked if there was anything else the appellant wished to say or whether there was anyone else in court who wished to say anything on behalf of the appellant. The appellant's father, Mr Kelvin Onus, responded. Part of that response is not recorded on the transcript.

(d) the magistrate stated, "There will be, you understand, an order that you pay for the damage that you've done to the vehicle. I will give you some time to pay that, but there will be an order in the consequence of a finding of guilt in relation to that charge, I think there's some $1,700 damage or thereabouts that you'll have. How will you be able to pay that, or how much can you pay per month in relation to that?"

(e) there was a discussion between the appellant and the magistrate as to the amount of instalments which could be paid by the appellant. The magistrate stated:
"If you consent, what I'm prepared to do is to release you on your undertaking, as I have indicated, but without recording a conviction, an undertaking that you be of good behaviour for a period of 12 months. It will be a condition of the undertaking that you actually pay this compensation. Now that may, of course, take longer than that 12 month period, but if you fail to pay the compensation, that would breach the undertaking as well, do you understand that?"

(f) the magistrate then released the appellant on the undertaking referred to.

11. Accordingly, on each of the five charges, the magistrate ordered that the charge would be adjourned without conviction to the Portland Magistrates' Court on 20 January 2005, that the defendant be released upon giving an undertaking commencing 21 January 2004 to appear before the adjourned date if called upon during the period of adjournment, to be of good behaviour during the period of adjournment, and to pay $1,791.35 compensation by instalments of $30 each month, the first payment to be made on 21 February 2004.

The proceedings

12. The appellant commenced two proceedings to appeal against the orders of the magistrate. In the first proceeding (No. 4589 of 2004) the appellant appealed from the orders made by the magistrate in respect of each of the five charges. In addition, the appellant commenced a second proceeding (No. 4590 of 2004) in which she appealed against the order of the magistrate on the

charge under s197(1) of the *Crimes Act*. The second proceeding was instituted out of an "abundance of caution".

13. Both proceedings came before Master Wheeler on an *ex parte* application by the appellant on 20 February 2004. The Master made orders setting out a number of questions of law raised by the appeal. Initially, before me, Mr Holdenson QC, who appeared on behalf of the respondent, foreshadowed a submission that the questions formulated did not consist of questions of law "from a final order" of a magistrates' court. However, after Mr Maxwell QC, who appeared with Mr Lavery for the appellant, had made oral submissions, Mr Holdenson did not persist with that contention.

Grounds of appeal

14. By his order the Master identified a number of questions of law for determination in the appeal. Mr Maxwell, in his submissions, consolidated those questions of law into three principal grounds of appeal, namely:

> (a) the appellant did not plead guilty to all of the charges. No admissible evidence was led in support of the charges in respect of which she did not plead guilty. Accordingly, the magistrate had no power to find the appellant guilty of any of the charges or to proceed upon a finding of guilt in respect of them;
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> (b) the Magistrates' Court lacked jurisdiction to hear the charge of intentionally, without lawful excuse damaging property under s197(1) of the Crimes Act;
>
> (c) the magistrate failed to comply with the requirements of natural justice.

Did the appellant plead guilty?

15. The appellant submitted that the magistrate had no power to find the appellant guilty of any of the charges unless she either pleaded guilty or the magistrate heard admissible evidence establishing her guilt beyond reasonable doubt.

16. The original transcript tendered before me did not record that the appellant had pleaded guilty to any of the offences. However, because of the incomplete nature of that transcript the magistrate was requested to report whether a plea was taken in respect of those charges. In his report the magistrate stated that the appellant was asked how she pleaded to each of the five charges, and that he understood that she pleaded guilty to all of them. The passage of the transcript, as supplemented by Flagstaff Studios, and set out in paragraph 8 of these reasons, records the appellant as acknowledging that she intended to plead guilty to one charge of criminal damage and "charge in relation of assault police". Based on that passage Mr Maxwell QC contended that the evidence only indicated that the appellant intended to plead guilty to two charges, and that no plea was taken to two of the three charges of assault police, and the charge of being drunk in a public place.

17. The tape and the transcript as supplemented by Flagstaff Studios do not make it entirely clear whether the appellant did or did not plead guilty to all five charges. However, I do note that immediately before the passage to which I have just referred, the prosecutor had made it clear to the magistrate that he intended to proceed against the appellant on all five charges. The part of the transcript at which the magistrate took the plea from the appellant is, as I have stated, incomplete, and the tape cannot be better deciphered. It would offend common sense to find that the magistrate, having heard the prosecutor announce that he intended to proceed on all five charges, only received a plea in relation to two of them. In this context I note what was stated by the magistrate in his report, and on which I am entitled to act under Rule 58.14. Based on those matters I am not prepared to find that the magistrate did not take a plea from the appellant of guilty on all five charges which had been brought against her.

Jurisdiction to hear the charge under *Crimes Act* s197(1)

18. The charge against the appellant under s197(1) of the *Crimes Act* – that she intentionally and without lawful excuse damaged property belonging to another – was laid against her on 20 January 2004, the day before she attended at the Magistrates' Court. According to the affidavit of Constable Atchison, on 21 January he handed a copy of the charge to Mr Walter Saunders, at the court, while Mr Saunders was conferring with the appellant.

19. Section 53(1)(b) of the *Magistrates' Court Act* 1989 provides that if a defendant is charged before the court with any offence referred to in Schedule 4 of the Act, the court may hear and determine the charge summarily if the defendant consents to a summary hearing. By clause 35 of Schedule 4 of the Act, the charge under s197(1) of the *Crimes Act* is a charge to which s53(1)(b) of the *Magistrates' Court Act* applies. Accordingly, in order that the court have jurisdiction, the appellant must first have consented to the court proceeding by summary hearing of it.

20. Originally Mr Maxwell submitted on behalf of the appellant that the magistrate had no jurisdiction to hear and determine the charge brought against his client under s197 of the *Crimes Act* on two grounds, namely:

> (a) there was no evidence that the appellant had been served with the charge;
>
> (b) the evidence did not establish that the magistrate had obtained the consent of the appellant to have the charge heard and determined by summary hearing under s53(1)(b) of the *Magistrates' Court Act*.

21. I shall first deal with the second basis originally contended for by Mr Maxwell. The transcript does not reveal whether the magistrate did seek and obtain the consent of the appellant to have that charge heard summarily. However in his report the magistrate confirmed that he did in fact obtain the consent of the appellant to have the matter heard and determined summarily. His Worship stated that he obtained the appellant's consent at the stage at which the transcript records that the equipment malfunctioned. The magistrate was unable to identify, with certainty, whether he obtained the consent directly from the appellant or alternatively through Mr Howman. In this context I note that the appellant, in her affidavit, did not contend that she had not given consent to a summary hearing of the charge. In his affidavit the police prosecutor, Mr McRae, swore that although he could not specifically recall if the magistrate asked whether the appellant consented to jurisdiction, the invariable practice of the magistrate was to seek that consent. Based on the contents of the magistrate's letter, Mr Maxwell properly conceded to me, in argument, that I could take the view that appropriate consent had been obtained from his client by the magistrate. I consider that that concession was correctly made. Accordingly, I do not find that the magistrate failed to obtain the consent of the appellant to having the matter determined by him summarily.

22. The first basis of the contention of the appellant was that there had been no valid service of the charge pursuant to s197(1) of the *Crimes Act* on her. As I have already stated, that charge was first filed on 20 January, and was handed to Mr Saunders by Constable Atchison on 21 January. In her affidavit the appellant has sworn that she does "not recall" being served or provided with a copy of the charge.

23. The amended transcript to the proceedings records the magistrate stating that he understood that the appellant intended to plea guilty to the charge of criminal damage. At the outset of the proceedings, the magistrate commenced by asking the appellant what she sought to do in relation to the charge of criminal damage, to which the appellant responded that she wished to seek more legal advice. Based upon those facts I am not satisfied that the appellant was not provided with or had notice of the charge. She has not sworn that she did not have the notice of it; she has only sworn that she does not recall having notice of it.

24. There is no statutory requirement for the service of a charge, as distinct from a requirement for the service of a summons. Section 26(1) of the *Magistrates' Court Act* 1989 provides that a criminal proceeding must be commenced by filing a charge with a Registrar or (if the defendant is arrested without warrant and released on bail) with a bail justice. Section 32(1) provides that a defendant is entitled to receive a copy of the charge sheet from the informant or the appropriate registrar. The principles of natural justice – to which I shall return later – obviously require that the accused must have adequate notice of a charge. Section 28 of the Act provides that, on the filing of a charge, application may be made for the issue of a summons or a warrant to arrest in order to compel attendance of a defendant. Section 34 of the Act makes specific provision for the service of the summons.

25. Thus the *Magistrates' Court Act* does not contain any express requirement for the actual service of a charge. It is sufficient the charge be brought to the notice of the accused person. Further, the authorities suggest that statutory provisions such as s34 of the Act, which require the service of a summons more than a prescribed time before its return, do not exclude the operation

of the principle that, however a person has been brought before a court, that person is liable to answer any charge or information then and there brought against him; see *R v Hughes*[4]; *Kingston Tyre Agency Pty Ltd v Blackmore*[5]. Of course the operation of that principle is subject to the right of the accused person to ask for and obtain an adjournment if the accused is taken by surprise; see for example *McManamy v Fleming*[6].

26. For those reasons I reject the submission of the appellant that the magistrate did not have jurisdiction to hear and determine the charge brought against her under s197(1) of the *Crimes Act*.

Natural justice

27. The main submission on behalf of the appellant was that the magistrate had failed to comply with the rules of natural justice. In particular, it was submitted that:

> (a) the magistrate had failed to adjourn the matter as sought by the appellant's solicitor, and as requested by the appellant at the commencement of the hearing on 21 January 2004. In support of his submissions Mr Maxwell referred to s39 of the *Magistrates' Court Act* 1989;
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> (b) the charge under s197(1) of the *Crimes Act* had not been properly served on the appellant and she did not have sufficient notice of it;
>
> (c) the magistrate conducted himself in a manner which gave rise to a reasonable apprehension of bias;
>
> (d) the magistrate relied on the police summary of evidence, without the appellant being provided with that document;
>
> (e) the magistrate made it a condition of the undertaking on which the proceeding was adjourned for 12 months that the appellant pay compensation, but when no notice of application for such an order had been provided to the appellant.

28. Mr Holdenson submitted that there had been no breach of the rules of natural justice. He contended:

> (a) that the appellant had been given the opportunity to seek advice. The magistrate had expressly stood the matter down so that the appellant could consult with people at court before she announced that she desired the matter to be heard in the Koori Court on that day. Having received that advice she no longer wished to have the matter adjourned;
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> (b) the appellant had adequate notice of the charges brought against her, and thus of the essential facts constituting those charges;
>
> (c) the magistrate did not conduct himself in a manner which gave rise to an apprehension of bias as referred to in the authorities.

29. There are two fundamental requirements of the rules of natural justice. First, an accused person must have a reasonable opportunity to know the case against her, and to make answer to that case. Secondly, an accused is entitled to have the charges heard free of actual or apprehended bias on the part of the magistrate. In the present case the appellant relies on the proposition that the magistrate conducted himself in a manner which gave rise to an appearance of bias.

30. The transcript records that, on the first occasion when the appellant's matter was called on for hearing, the appellant, when asked what she proposed to do, stated, "I seek more legal advice." The magistrate then referred to the letter which he had received from the appellant's solicitor. That letter is important because, not only did it seek an adjournment, but also it stated that the appellant's solicitor was in the process of obtaining a copy of the police brief of evidence with a view to advising the appellant. In addition, the appellant had only just been served with the charge under s197(1) of the *Crimes Act*. She could not have sought and obtained even preliminary advice from her solicitor relating to that charge. Thus, as matters stood, when the case was first called before the magistrate, the appellant had strong grounds on which to apply for an adjournment.

31. Mr Holdenson did not gainsay the contention that if matters had remained at that stage, the magistrate would have been remiss in not granting the appellant's application for an adjournment. However, Mr Holdenson contended that the ensuing discussion between the appellant and the

magistrate superseded the appellant's initial application for an adjournment. As I have set out above, a discussion occurred in which the magistrate commented on the advice given to the appellant by her solicitor, and canvassed the merits of pleading guilty. His Worship then stood the matter down so that the appellant should have the opportunity to consider whether she then wished to plead not guilty, in which event the magistrate would need to adjourn the matter to a later date.

32. It is well established that the decision, whether to accede to or to refuse an application for an adjournment, is an exercise of a judicial discretion. Appellate courts rarely interfere with a trial judge's exercise of that discretion. However, where the result of a refusal of an adjournment might be to prevent a party from presenting his or her case as fully as necessary and within the limits of the law, then an appellate court will interfere with a trial judge's exercise of his discretion. Such an intervention by an appellate court occurs where it is necessary to prevent an injustice to one or other of the parties caused by the failure of the lower court to grant the adjournment; see *McColl v Lehmann*[7]; *Maxwell v Keun*[8]; *Walker v Walker*[9]; *Bloch v Bloch*[10]; *State of Queensland v J.L. Holdings Pty Ltd*[11].

33. In this case the magistrate did not expressly refuse to grant an adjournment. Rather, after the appellant requested an adjournment, the magistrate discussed the matter with her, and then stood the matter down to enable the appellant to consider whether she wished to plead not guilty, in which case the matter would need to be adjourned. However, the fact remains that the appellant had initially clearly signified that she wished to plead not guilty, and that she considered that she was not guilty of the three assault charges. She had only just been served with the charge of intentionally causing damage to property under s197(1) of the *Crimes Act*. She was an 18 year old Aboriginal girl with no prior convictions and no previous court experience. She had sought the advice of a solicitor, who wished to make further enquiries before advising his client as to the course which she should adopt. At the time of coming to court the appellant did not have a copy of the police brief. In those circumstances, in my view, it was clear that the appellant did not have an opportunity to properly consider the charges brought against her, and to seek proper advice as to what course she should take in respect of them. She was within her rights in seeking the adjournment. As Mr Maxwell has pointed out, under s39 of the *Magistrates' Court Act* 1989, the court was required to adjourn the matter if requested by the defendant, if the court was satisfied that the defendant had not had a reasonable opportunity to obtain legal advice.

34. It is clear both from the transcript and also from the report of the magistrate under Rule 58.14 that, up to the stage at which the magistrate stood the matter down so that the appellant could consider her position, his Worship had sought to conduct a "contest mention" hearing. His Worship noted in his report to me:

> "Such a hearing involves the Magistrate receiving details of the police summary of facts and, *inter alia*, in some cases giving a sentence indication in an attempt to resolve potentially contested cases."

35. In other words, the magistrate conducted a hearing in order to endeavour to resolve preliminary issues relating to the case, and in particular the question whether the appellant was contesting the issue of her guilt of the five charges brought against her. However, as pointed out by Mr Maxwell in his submissions, it was precisely that hearing which the appellant and her solicitor sought to have adjourned. In other words, the appellant and her solicitor had sought to have the contest mention hearing adjourned so that the appellant could receive proper advice in relation to the matters to be canvassed at the contest mention hearing. It is, as I have already stated, relevant that the appellant had only just received a copy of the charge under s197(1) of the *Crimes Act* and, understandably, wished to seek legal advice in respect of it. Further, her solicitor had not had access to a copy of the police brief of evidence. The appellant had not had the opportunity to obtain informed advice from the solicitor whom she had chosen to consult. Under s39 of the *Magistrates' Court Act*, and at common law, the appellant had a right to seek and obtain an adjournment in order that she might have the benefit of that advice.

36. When the matter was stood down the appellant did consult with persons who were with her at the court, as well as with a local solicitor, Mr Howman, who happened to be present. However, it is clear from the transcript that Mr Howman did not have the opportunity to take detailed instructions from the appellant, nor to give her fully informed advice concerning the

course which she should take. It is clear from the transcript that the main source of "advice" on which the appellant might have relied consisted of the preliminary views expressed to her by the magistrate in the contested mention hearing. In that hearing the magistrate expressed views as to the difficulties as to succeeding in a plea of not guilty, contrasted with the advantages of pleading guilty. That advice, whilst no doubt given by the learned magistrate with the best of intentions, nevertheless had the potential to overbear the appellant's original intention to have the matter adjourned so that she might seek legal advice. It is also significant that, in the course of the mention hearing, the appellant had expressly stated her desire to defend the assault charges.

37. In those circumstances, I consider that it behoved the magistrate to adjourn the proceeding to a further date in order to enable the appellant to obtain legal advice and, if she so desired, to properly prepare a defence to the charges which had been brought against her. I am mindful of the admonition in the authorities that the courts are very slow to interfere with the discretion of a judge or magistrate on the issue as to whether to allow an adjournment. Nevertheless, in my view, the conduct of the proceedings before the magistrate was productive of an injustice to the appellant, by being deprived of the opportunity to seek and obtain legal advice, and, if she so desired, to contest the charges which had been brought against her. I therefore consider that there was a breach of the rules of natural justice based on the failure of the magistrate to accede to the appellant's application for an adjournment, and based on his Worship's proceeding to take a plea from the appellant on the five charges, and to hear and determine the submissions in respect of the question of penalty.

38. Mr Maxwell also contended that the rules of natural justice had not been complied with because the conduct of the magistrate had been such as to give rise to an apprehension of bias. Mr Maxwell did not submit that the magistrate had acted with actual bias. In *Johnson v Johnson*[12] the High Court expressed the test for determining whether a judge is disqualified by reason of an appearance of bias in the following terms:

> " ... The test ... is whether a fair minded lay observer **migh**t reasonably apprehend that the judge **might** not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide". (Emphasis added).

See also *Livesey v The New South Wales Bar Association*[13]; *Gascor v Ellicott and ors*[14].

39. In support of his submissions Mr Maxwell referred particularly to the part of the transcript in which the magistrate stated that, on the face of it, if a defendant had been affected by alcohol and there appeared to be witnesses to the various incidents which occurred, quite often it is difficult for the defendant to successfully contest the charges. Mr Maxwell submitted that the "advice" given by the magistrate to the appellant during the contest mention hearing was calculated to induce a plea of guilty by the appellant, and was based only on the police summary which he had before him. Mr Maxwell contended that that conduct of the magistrate not only bespoke a predisposition of the magistrate to consider that the appellant was guilty of the offences charged, but also a predisposition to take a partisan attitude against the appellant and in favour of the informant on the issue of penalty.

40. It is clear from the transcript that at no stage did the magistrate intend to hear the case on that day, if in fact the appellant wished to contest the charges. No doubt if the magistrate had proceeded to hear the case as a contest, there would be significant force in Mr Maxwell's submission that the magistrate had so conducted himself during the contest mention hearing as to give rise to an apprehension of bias by a fair minded lay observer. However, the matters which would have given rise to that apprehension related to the views expressed by the magistrate in relation to the issue whether or not the appellant was guilty of the offences with which she had been charged. The only substantive matter which the magistrate proceeded to hear and determine was the plea and sentence. The magistrate had not expressed any views adverse to the appellant in respect of that issue. Indeed, he had indicated that ordinarily, where a young person who is a first offender pleaded guilty, then he would not proceed to impose a conviction.

41. Mr Maxwell contended that nonetheless the conduct of the magistrate had been such as to give rise to the appearance that he was partisan, in that he only relied on the police summary which was before him in giving advice to the appellant as to the likely outcome of the case during

the contest mention hearing. Mr Maxwell contended that in those circumstances a fair minded lay observer might apprehend that, on the issue of penalty, the magistrate might also take a partisan approach against the appellant and in favour of the informant.

42. Having read the transcript on a number of occasions, and endeavoured to listen to the tape, I do not consider that a fair minded lay observer might apprehend that the magistrate might not bring an impartial and unprejudiced mind to the resolution of the questions which he was required to determine, after the appellant had pleaded guilty. I do not consider that, by referring to the summary, his Worship displayed, or might be seen to display, partisanship on the issue of penalty. In reaching that conclusion, I specifically refrain from expressing any view about the appropriateness or desirability of magistrates, at mention hearings, advising defendants of the advantages and disadvantages of pleading guilty or not guilty, and of venturing preliminary views as to the likely success or failure of a plea of not guilty, and of providing an estimate or "quote" of the likely penalty should the accused plead guilty. I do note that the guidelines, which are apparently part of a practice note disseminated to magistrates, do sanction such an approach by a magistrate. This is not the occasion to consider and express any view at all whether such an approach should or should not be continued. However, I do not intend, by this judgment, to convey any impression that such an approach is appropriate or desirable. I do no more than reach a view, on the facts contained in this case, that I am not satisfied that a fair minded lay observer might reasonably apprehend that the magistrate might not bring an impartial and unprejudiced mind to the resolution of the question to be determined by him once the appellant had pleaded guilty.

43. The next matter raised by Mr Maxwell was that the magistrate had recourse to the police summary during both the contest mention hearing and the plea and sentence, in circumstances in which the appellant did not have access to that document. He contended that the magistrate therefore had before him, and relied on, material to which the appellant could not have access. Mr Holdenson contended that I should not infer from the transcript or from the affidavits that the appellant did not have access to the document. It is not necessary for me to resolve that issue of fact, given the conclusions I have already reached above. Nonetheless a careful examination of the transcript does convey the impression that the appellant did not have access to that document. It is of course fundamental that any document relied upon by a magistrate, whether on the issue of guilt, or on the question of penalty, must also be provided to the accused person; see *R v Carlstrom*[15]; *R v Wise*[16]; *R v Ulla*[17].

44. Finally, Mr Maxwell also contended that the magistrate erred in making it a condition of the undertaking on which the proceeding was adjourned for 12 months that the appellant pay compensation. Mr Maxwell contended that no notice of an application for such an order had been made to the appellant. It is clear from the transcript that the obligation of the appellant to pay compensation does not derive from an order made under s77 of the *Sentencing Act*, but rather was a condition of the undertaking on which the magistrate adjourned the matter for 12 months. Thus, as a jurisdictional matter, the appellant was not required to be given notice of any "application" for compensation. However, the imposition of that condition, on the same day on which the appellant had received a copy of the charge, does highlight the denial of natural justice to the appellant caused by the failure of the magistrate to adjourn the contest mention hearing, when he had been requested to do so. The obligation imposed on the appellant under the condition imposed on her undertaking was substantial. The fact that she signed an undertaking containing that condition without access to legal advice, and after she had been charged on the same day with the offence, on which the undertaking was made, only serves to reinforce the conclusion which I have come to that the appellant was denied natural justice by reason of the fact that the magistrate did not adjourn the matter when requested to do so.

Conclusion

45. I have therefore concluded that the appeals in this matter should be allowed on the basis that the appellant was denied natural justice by reason of the fact that the magistrate did not adjourn the contest mention hearing when requested to do so. In reading the transcript I have no doubt that the magistrate was attempting to adopt a pragmatic approach to the proceedings, and that he was doing so conscientiously in what he considered to be the best interests of the appellant. I have no doubt that the magistrate genuinely considered that, on the material before him, the appellant would not be well served by contesting the charges, and that it was in her interest

to plead guilty and to receive the statutory credit to which she was entitled for doing so. It is of course desirable that an element of pragmatism be retained in Magistrates' Court proceedings. In a busy court it is not easy to preserve a balance between the desire to be practical and the need to observe the requirements of natural justice. However, on the facts of this case I have come to the conclusion that there was a breach of the rules of natural justice in the manner I have just described.

Order

46. Accordingly, and subject to hearing from counsel, I propose making the following orders in each of the two matters before me:

(1) That the appeal be allowed;
(2) that the orders made on 21 January 2004 by the Magistrates' Court at Portland be set aside;
(3) that the matter be remitted to the Magistrates' Court at Portland for re-hearing.

47. I shall hear counsel on the question of costs.

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[1] [1956] VicLawRp 34; [1956] VLR 215 at 221; [1956] ALR 731.
[2] [1965] VicRp 48; [1965] VR 367.
[3] [1970] VicRp 63; [1970] VR 476 at 477.
[4] (1879) 4 QBD 614 especially at 626-7.
[5] [1970] VicRp 81; [1970] VR 625 at 638.
[6] [1889] VicLawRp 67; (1889) 15 VLR 337.
[7] [1987] VicRp 46; [1987] VR 503 at 506; (1986) 24 A Crim R 234.
[8] [1928] 1 KB 645 at 653.
[9] [1967] 1 All ER 412; [1967] 1 WLR 327 at 330.
[10] [1981] HCA 56; (1981) 180 CLR 390; (1981) 37 ALR 55; (1981) 55 ALJR 701 at 703.
[11] [1997] HCA 1; (1997) 189 CLR 146 at 155; (1997) 141 ALR 353; 71 ALJR 294.
[12] [2000] HCA 48; (2000) 201 CLR 488 at 492; (2000) 174 ALR 655; [2000] FLC 93-041; (2000) 74 ALJR 1380; (2000) 26 Fam LR 627; (2000) 21 Leg Rep 21.
[13] [1983] HCA 17; (1983) 151 CLR 288 at 294-5, 300; 47 ALR 45; (1983) 57 ALJR 420.
[14] [1997] 1 VR 332 at 340.
[15] [1977] VicRp 44; [1977] VR 366 at 367.
[16] [2000] VSCA 169; (2000) 2 VR 287 at 294.
[17] [2004] VSCA 130; [2004] VSCA 130 at para 20.

APPEARANCES: For the appellant Onus: Mr CM Maxwell QC with Mr AJ Lavery, counsel. Access Law, solicitors. For the respondent Sealey: Mr OP Holdenson QC, counsel. Ms Kay Robertson, Solicitor for Public Prosecutions.
