31/97

SUPREME COURT OF VICTORIA

TRAN v MAGISTRATES' COURT of VICTORIA (AT BROADMEADOWS) and CLANCHY

Coldrey J

15-17 April, 5 May 1997 (aff'd on appeal [1998] 4 VR 294)

PROCEDURE – ABUSE OF PROCESS – ACCUSED INTERROGATED BY POLICE OFFICER WHO WAS VICTIM OF ALLEGED ASSAULT – INTERNAL POLICE INVESTIGATION DELAYED – WHETHER CONFLICT OF INTEREST OR ABUSE OF PROCESS – EYEWITNESS NOT CALLED BY PROSECUTOR – NOT A TRUTHFUL WITNESS – DEFENCE NOTIFIED IN ADVANCE – EXPLANATION GIVEN BY PROSECUTOR – WHETHER MISCARRIAGE OF JUSTICE – WITNESSES ORDERED OUT OF COURT INCLUDING ACCUSED'S INSTRUCTING SOLICITOR – ACCUSED NOT DEPRIVED OF PROPER LEGAL REPRESENTATION – WHETHER MISCARRIAGE OF JUSTICE – DIRECTION BY ANOTHER MAGISTRATE TO PERMIT TAPE-RECORDING – APPLICATION FOR INFORMAL TAPE-RECORDING REFUSED BY MAGISTRATE SEIZED OF CASE – WHETHER MAGISTRATE BOUND BY PREVIOUS RULING – WHETHER MAGISTRATE IN ERROR IN REFUSING TO PERMIT INFORMAL TAPE-RECORDING: *MAGISTRATES' COURT ACT* 1989, S127.

After an extended hearing in the Magistrates' Court, T. was convicted of a number of charges. T. appealed to the Supreme Court on questions of law as follows—

1. Whilst at the police station, T. alleged he had been assaulted by the police informants and requested that the police internal investigation (IID) charge the informants with assault. As a result of the investigation, IID decided to take no further action. It was alleged that the failure to charge the informants amounted to an abuse of process whereby the proceedings should have been stayed. Further, it was said that the participation of the informants in the interview constituted a conflict of interest amounting to an abuse of process.

HELD: A police officer has a discretion whether or not to lay a charge in relation to an allegation by a third party of assault. In the circumstances, it would have been open to T. to initiate a private information. The conduct of the interview by the informants was neither illegal nor necessarily improper. The appropriate remedy was for T. to seek the exclusion of any evidence illegally or unfairly obtained; however, this was not sought as T. had made a "no comment" record of interview. Accordingly, the circumstances did not constitute an abuse of process nor lead to any miscarriage of justice.

2. An eyewitness who was sub-poenaed by the prosecution was not called as a witness. The prosecutor had formed the opinion that the witness would tailor any evidence given to achieve a particular result rather than giving truthful evidence. He also informed the defence of this fact on the first day of the hearing and later, during final submissions, informed the court why the witness was not called.

HELD: The decision whether or not to call a witness is within the discretion of the police prosecutor. The prosecutor is not bound to call a potential eyewitness and may decline to call a witness if there is a proper basis upon which to conclude that the witness is unreliable. In the circumstances it could not be said that the prosecutor's decision not to call the witness constituted an error of judgment nor did it result in a miscarriage of justice.

3. T.'s instructing legal practitioner had been sub-poenaed to give evidence in relation to some of the charges. An order by consent was made by the magistrate ordering witnesses out of court including the instructing solicitor.

HELD: The magistrate had a discretion whether or not to make the order. It was not put to the magistrate that T. could not have proper representation without an instructing solicitor in court. If the instructor's presence was considered to be vital, it would have been open to T. to seek an adjournment to arrange for a substitute instructing solicitor. In the circumstances T. was not deprived of proper legal representation as to result in a miscarriage of justice.

4. Prior to the hearing, another magistrate made an order that an informal taped record of the proceedings would be permitted. When the matter came on for hearing before another magistrate, the application to permit such a recording was refused but a stenographer was allowed to take notes of the proceedings.

HELD: The procedural ruling made by the first magistrate had nothing to do with the substantive hearing of the charges before the second magistrate. The ruling was not inviolable and was not binding on the magistrate who heard the charges. The refusal by the magistrate to permit informal tape-recording during the hearing was not an error in the exercise of discretion.

COLDREY J: [1] This is an appeal to the Supreme Court on questions of law pursuant to s92 of the *Magistrates' Court Act* 1989. It follows the conviction of Tien Tran (the appellant) of a number of offences after a hearing before Magistrate Mr John Klestadt (the first respondent) which extended over 23 days. The convictions related to two separate incidents, the first occurring at a solicitor's office in Alfreida Street St. Albans and the second at Keilor Downs police station.

At about 1.20 pm on Friday 15 November 1994 a youth, Martin Navarro was apprehended in St. Albans by an off-duty policeman, Constable Ziebell. The constable, who was in plain clothes, had observed Navarro snatch a bag from a lady. After apprehending Navarro, Constable Ziebell took him to a solicitor's office in Alfreida Street. A crowd having gathered outside that office Constable Ziebell sought help by way of police reinforcements. In the meantime it was alleged by the prosecution that the appellant, together with other youths, entered the solicitor's office for the purpose of rescuing Navarro from police custody. In the course of effecting this purpose it was alleged that the appellant had struck Constable Ziebell with a glass table top. When the police reinforcements arrived, the appellant and others fled the scene. In relation to this incident the Magistrate convicted the appellant on charges of rescue, assaulting police officer Ziebell with the intention to prevent lawful detention of a person, and assault with a weapon.

Later the same day the appellant, who was on bail for other matters, was required, as part of a bail condition, to report to the Keilor Downs police station. He did so at about 4.30 pm in the company of a Youth Worker, Mr Richard Tregear. **[2]** While at the police station he was taken into custody by Detective Senior Constable Gerard Clanchy and Detective Senior Constable David Leary for questioning about the incident at the solicitor's office. They refused permission for Mr Tregear to be present at any interview. What occurred thereafter in the interview room was a matter of great contention at the Magistrates' Court hearing. The appellant claimed that the police gratuitously assaulted him, kicking him in the head a number of times as well as striking numerous blows to his body. The contrary evidence of the two police officers was to the effect that the appellant, having suddenly commenced to struggle and lash out, had to be subdued and handcuffed. Having considered the police evidence and medical evidence called by the prosecution (which reflected the minor injuries to the appellant in contrast to his account), the Magistrate accepted the police version of events and convicted the appellant of assaulting Detective Senior Constable Clanchy. Whilst finding that body contact had occurred between the appellant and Detective Senior Constable Leary during the subduing of the appellant, the Magistrate dismissed the charge of assault, expressing the view that resisting a police officer in the execution of his duty would have been the more appropriate charge to lay — particularly where no injury had been occasioned.

Before turning to the specific grounds of this appeal it is necessary to briefly detail the subsequent events. It is common ground that after the incident in the interview room the two detectives proceeded to conduct a tape-recorded interview with the appellant. It commenced at 5.02 pm but was suspended about a minute later when the appellant indicated his wish to exercise his right to contact by telephone the solicitors, Kuek **[3]** & Associates. This was permitted and the solicitor, Mr Gabriel Kuek, arrived at Keilor Downs police station at about 6 pm In evidence given on a voir dire during the hearing, Mr Kuek claimed that he had observed injuries to the appellant and found evidence of a struggle in the interview room. The appellant complained about being assaulted and instructed Mr Kuek to make arrangements for a complaint to be lodged.

The subsequent events (so far as they are relevant) are set out in paras 10 to 12 of the appellant's affidavit sworn 31 August 1996. They are as follows:

> "10. Mr Kuek requested the attendance of the Duty Inspector of the area when the police refused his request to either charge me or recommence the interview and afford me the opportunity to apply for bail. As a result, Inspector Stubberfield attended at the Keilor Downs police station. He too refused to accede to Mr Kuek's request. Later that night, at Mr Kuek's request, two inspectors from the Internal Investigations Department (herein after referred to as 'IID') attended at the police station but refused to take my statement until D/S/C Clanchy and D/S/C Leary had interviewed me.

> 11. Upon the recommencement of the tape-recorded interview, D/S/C Clanchy again informed me that I was being interviewed in respect of 'rescue'. Towards the end of the interview, D/S/C Clanchy informed me that he wished, and then proceeded, to question me about allegedly assaulting him and D/S/C Leary.
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> 12. I said 'No comment' to the questions asked of me during the interview conducted by D/S/C Clanchy and D/S/C Leary. After that, the IID officers took photographs of myself and the interview room. I was then examined by Dr Lawry, whose attendance was arranged by IID. After that I was permitted to make a statement of complaint in the form of an affidavit to the IID investigators."

I interpolate that the appellant's solicitor Mr Kuek was present during this interview and, according to counsel for **[4]** the appellant Mr Perkins, was the source of the advice to make no comment. The defendant having been charged with a number of offences, including those for which he was later convicted, was granted bail and, following the lodgment of a surety of $2,500, was released late the following day.

Against that background I turn to the first question of law raised for decision. It was formulated in the following terms:

> "1(a) Should the presiding Magistrate have acceded to the Appellant's application to stay the proceedings as an abuse of process on the grounds that:
> (i) the interrogation of the Appellant was conducted by an alleged victim, being a policeman, of the Appellant's conduct (being an alleged assault);
> (ii) the investigation of the Appellant's accusations was specifically delayed until the alleged victim had interrogated the Appellant about, *inter alia*, the circumstances of the alleged assault?
>
> (b) Did –
> (i) the fact that an alleged victim of certain of the charges –
> (a) conducted the interrogation of the accused and;
> (b) laid the informants (sic) – and/or –
>
> (ii) the fact that the Appellant's allegations regarding the circumstances of the alleged assault were not investigated until after the alleged victim of such assault had interrogated the Appellant about, *inter alia*, the circumstances of the assault – **[5]** so affect the investigatory process as to lead to a miscarriage of justice and/or of the proper processes of the criminal law."

The argument advanced by Mr Perkins in relation to Ground 1 appeared to resolve itself into the assertion that the enumerated factors required the Magistrate to accede to the appellant's application for a stay of proceedings because they constituted an abuse of process. Because of the manner in which the submissions were developed it is necessary to canvass in some detail the principles relating to the staying of proceedings to prevent an abuse of process. These principles were discussed in *Jago v District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR 23; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307. In that case Mason CJ quoted with approval the observations of Richardson J of the New Zealand Court of Appeal in *Moevao v Department of Labour* [1980] 1 NZLR 464 at 482:

> "The justification for staying a prosecution is that the Court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. ..."

Mason CJ observed (643):

> "The continuation of processes which will culminate in an unfair trial can be seen as a 'misuse of the Court process' which will constitute an abuse of process because the public interest in holding a trial does not warrant the holding of an unfair trial."

His Honour stated that the power was discretionary and to be used in only the most exceptional circumstances. He also recognised that orders short of a stay of proceedings could be made to ensure fairness. He went on to state (644):

> "The test of fairness which must be applied involves a balancing process, for the interests of the accused cannot be considered in isolation without regard to **[6]** the community's right to expect that persons charged with criminal offences are brought to trial. [cases cited]. At the same time, it should not be overlooked that the community expects trials to be fair and to take place within a reasonable

time after a person has been charged....
To justify a permanent stay of criminal proceedings, there must be a fundamental defect which goes to the root of the trial 'of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences'."

Justice Brennan (at 650) stated that:

"The power [to stay proceedings] which was acknowledged to exist in *Barton* [[1980] HCA 48; (1980) 147 CLR 75; (1980) 32 ALR 449; 55 ALJR 31] is a power which has a dual purpose:

> 'to prevent an abuse of process or the prosecution of a criminal proceeding in a manner which will result in a trial which is unfair when judged by reference to accepted standards of justice.'

One purpose of the power is to ensure a fair trial, the other to prevent an abuse of process. A power to ensure a fair trial is not a power to stop a trial before it starts. It is a power to mould the procedures of the trial to avoid or minimise prejudice to either party. ...

Obstacles in the way of a fair trial are often encountered in administering criminal justice. Adverse publicity in the reporting of notorious crimes [case cited], adverse revelations in a public inquiry [case cited], absence of competent representation [cases cited], or the death or unavailability of a witness, may present obstacles to a fair trial; but they do not cause the proceedings to be permanently stayed. Unfairness occasioned by circumstances outside the court's control does not make the trial a source of unfairness. When an obstacle to a fair trial is encountered, the responsibility cast on a trial judge to avoid unfairness to either party but particularly to the accused is burdensome, but the responsibility is not discharged by refusing to exercise the jurisdiction to hear and determine the issues. The responsibility is discharged by controlling the procedures of the trial by adjournments or other **[7]** interlocutory orders, by rulings on evidence and, especially, by directions to the jury designed to counteract any prejudice which the accused might otherwise suffer.

More radical remedies may be needed to prevent an abuse of process. An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. ... But it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness."

In *Ridgeway v R* [1995] HCA 66; (1994-1995) 184 CLR 19; (1995) 129 ALR 41; (1995) 69 ALJR 484; (1995) 78 A Crim R 307; (1995) 8 Leg Rep C1 the High Court was confronted with a case in which Australian Federal Police officers had been involved in the importation of heroin from Malaysia to be delivered to Ridgeway who, upon his receipt of the heroin, was charged with possession without reasonable excuse of a prohibited import contrary to the relevant section of the *Customs Act* 1901 (Cth). It was argued (inter alia) by the appellant that since the heroin had been illegally imported the trial judge should have exercised a discretion to exclude evidence of such importation on the grounds of public policy and further, that because of the illegal importation the prosecution was an abuse of process and ought to have been permanently stayed.

In determining that there should be a permanent stay of further proceedings in relation to the Commonwealth offence Mason CJ, Deane and Dawson JJ, in a joint judgment, considered both the discretion to exclude illegally or improperly obtained evidence to preserve the integrity of the administration of criminal justice and the staying of **[8]** proceedings. In the course of the judgment their Honours remarked: (p32)

"The function of determining whether, in the circumstances of a particular case, a criminal prosecution should be initiated and maintained is essentially that of the Executive. The function of hearing and determining the prosecution, when initiated and while maintained, is that of the courts. Nonetheless, it has long been established that, once the court is seized of criminal proceedings, it has control of them and may, in a variety of circumstances, reject relevant and otherwise admissible evidence on discretionary grounds or temporarily or permanently stay the overall proceedings to prevent abuse of its process. One such discretion is the discretion to exclude unlawfully procured evidence on public policy grounds. That discretion is properly to be seen as an incident of the judicial powers vested in the courts in relation to criminal matters. Neither its existence nor its exercise involves any intrusion into the exclusive sphere of the Executive. Nor, in our view, does the existence or exercise of a judicial discretion to exclude, on public policy grounds, all evidence of an offence or an element of an offence procured by unlawful conduct on the part of law enforcement officers."

In relation to the staying of proceedings their Honours stated: (p40)

> "... the appropriate ultimate relief in a case where the commission of the charged offence has been procured by illegal police conduct may well be a permanent stay of further proceedings. Ordinarily, the question whether evidence of an offence or of an element of an offence should be excluded pursuant to the discretion to exclude evidence on entrapment grounds should be raised and determined in the course of a preliminary hearing. If, on such a hearing, a ruling is made that evidence of the charged offence or of an element of it should be so excluded, it will be apparent that it would be an abuse of process for the Crown to proceed with the trial. The reason why that is so is not that the commission of the charged offence was procured by illegal conduct on the part of the police. It is that the proceedings will necessarily fail with the consequence that a continuation of them would be **[9]** oppressive and vexatious. It is true that there is an appearance of artificiality in the distinction between an exclusion of all evidence and a stay of proceedings. There is, however, a significant distinction in principle between staying criminal proceedings on the ground that the proceedings in themselves constitute an abuse of process and staying further steps in the proceedings on the ground that, due to the effect of evidentiary rulings made in them, they must fail."

The first argument advanced by counsel for the appellant (and which may be regarded as having a very tenuous relationship with Ground 1 as formulated) was, as I apprehend it, that the police (by which is meant the members of the IID) should, on the basis of the appellant's complaint of assault, have charged the informants Clanchy and Leary and had the Court adjudicate upon the matter. The police failure to do so was said to be an abuse of process which should have attracted a stay of proceedings.

It was asserted that the duty of the police was laid down in the case of *McLiney v Minster* [1911] VicLawRp 67; [1911] VLR 347; 17 ALR 336; 33 ALT 33. That case discusses the right and duty of constables to take into custody persons accused by third parties of assault. If it is to be regarded as authority for the proposition that a police officer must arrest an alleged offender on the say so of a third party without the exercise of any discretion, it may be regarded as obsolete (see for example *The Law of Criminal Investigation*, Peter Gillies, p163 and 211) Fox, *Victorian Criminal Procedure* 1997, p47ff. and *Hill v Chief Constable of West Yorkshire* [1988] QB 60; [1987] 1 All ER 1173; [1987] 2 WLR 1126 at p1133ff. Far less is it authority for any proposition that a police officer who is the recipient of allegations of an offence, such as assault, has no discretion as to whether an alleged offender is made the subject of a prosecution.

[10] In the present case inquiries conducted by IID led the investigating police to the conclusion that the allegations of the appellant were not substantiated. It was contended that, in reaching that conclusion, the procedures followed by the police were inadequate and misconceived and wrong questions were addressed by them. Even if these allegations were correct, (and no substantive material was placed before the Court to that effect), the remedy open to the appellant was to initiate a private information. On any view of this matter the non-charging of the informants by the IID investigators does not attract the principles of abuse of process as I have set them out.

An ancillary argument was that the appellant, by reason of his youth and ethnic origin, was a member of a disadvantaged class of persons. Where such a class of persons alleged criminal activities against them by police officers the integrity of the criminal justice system required that such allegations be the subject of a judicial investigation. Not surprisingly no authority was cited for this proposition and it is totally without substance.

It was next argued that the participation in the interviewing of the appellant by the informants either as alleged victims, as characterised in Ground 1, or as alleged perpetrators of assaults upon the appellant, constituted a conflict of interest and tainted the whole of the investigation both as to events at the solicitor's office and incidents in the interview room at the Keilor Downs police station. In these circumstances it was submitted that public justice had not been and could not have been seen to be done. Consequently an abuse of process had occurred.

[11] The procedure whereby police interview persons whom they charge with assault upon them is one which occurs frequently and often of necessity at country police stations. Even assuming for the purpose of argument that where a suspect complains that interrogating police have assaulted him (as occurred here), it may be preferable for independent members to conduct any subsequent interrogation, the fact that this did not occur cannot be characterised as constituting an abuse of process as defined in the cases. The conduct of the interview by a police officer who

is the alleged victim, or indeed the alleged perpetrator of an assault, is not illegal or necessarily improper. Even if it were so, the appropriate remedy, depending upon the circumstances, would be to seek the exclusion of any evidence garnered in the process in the exercise of the Courts discretion to exclude evidence illegally or unfairly obtained. This was not sought in the instant case since the appellant had, on legal advice, made a "no comment" record of interview.

It was faintly argued before this Court that unfairness had been created because the circumstances prevented the appellant giving his account of these events. Bearing in mind the situation that the second interview was tape-recorded and hence would be independently verifiable, and that it took place in the presence of the appellant's own solicitor, such a submission verges on the fatuous.

No material was placed before this Court as to how any subsequent investigation of this matter, and in particular, the events at the solicitor's office, was tainted by the procedure adopted. In any event if an investigation is biased or inadequate, these matters are appropriately the subject of forensic exploration before the tribunal of fact. Questions of **[12]** motive and a witness's interest in self-protection relate to the weight a Court may attribute to such witness's evidence. They do not constitute grounds for staying proceedings.

Insofar as complaint is made about the timing of the IID police taking a statement from the appellant, it is sufficient to say that it neither constitutes an abuse of process or, in my view, can be said to lead to any miscarriage of justice. In the course of argument Mr Perkins referred to portions of a large number of cases. An examination of them indicates that some of the passages relied upon may be regarded as having been taken out of context and other cases are, on close analysis, not in point. I do not propose to set them out in the course of this judgment. Such of these matters as were argued before the Magistrate were dealt with in the course of Rulings 3, 4 and 5 exhibited to the affidavit of James Ruddle sworn 12 November 1996. In substance those rulings are unexceptionable. In the result the questions raised in Ground 1 must be answered "No".

Ground 2 was argued by Dr Corns on behalf of the appellant. It is couched in these terms:

> "Did the failure by the prosecution to call eyewitness Zogheib, without sufficiently explaining such failure and/or warning the Appellant, result in a miscarriage of justice."

According to the affidavit of the appellant Mr Zogheib, who was one of the civilian witnesses present at the solicitor's office, and who pleaded guilty to charges arising from that incident, was subpoenaed by the prosecution but ultimately not called to testify. It was said that no **[13]** evidence was led by the prosecution as to why Mr Zogheib was not called.

It appears that argument was addressed to the Magistrate in the course of final submissions by the appellant's counsel in relation to the non-calling of this witness. In responding to the contention that he should draw a negative inference from the failure of the prosecution to call Mr Zogheib either to give evidence in chief or to be cross-examined by the defendant the Magistrate remarked:

> "The question of whether the prosecutor has made an error of judgment in not calling Mr Zogheib could have no effect on this trial, other than the possible drawing of an adverse inference because I have no material at all upon which to take the exceptional course of calling the witness myself, and the defence has not sought to call him to provide material evidence upon which I could exercise my discretionary powers, if indeed I have any. In all the circumstances of this case I am satisfied that the only inference open from the failure of the prosecutor to call Mr Zogheib is that he would not give evidence favourable with the prosecution, but, as will be seen later, the drawing of that inference has had no overwhelming effect on my decision in this case."

On one view such a ruling was favourable to the appellant. However, the appellant's submission before this Court, as I apprehend it, is that such a failure resulted in a miscarriage of justice. The starting point for such a consideration is the decision of the High Court in *R v Apostolides* [1984] HCA 38; (1984) 154 CLR 563; 53 ALR 445; (1984) 58 ALJR 371; 15 A Crim R 88. This decision encompasses all of the earlier leading authorities. At p575 the Court, in a joint judgment, sets out the general propositions applicable to the conduct of criminal trials in Australia.

They are well known and I do not propose to set them out seriatim. The substance of these **[14]** propositions was formally gazetted in July 1984 in the form of guidelines by the Director of Public Prosecutions for members of the Victoria Police when conducting prosecutions. It is clear that the decision whether or not to call Mr Zogheib was within the discretion of a prosecutor and further, that a prosecutor may decline to call a witness if there is a proper basis upon which to conclude that the witness is unreliable.

In developing his submission Dr Corns called in aid the case of *R v Shaw* (1991) 57 A Crim R 425. That was a case where the prosecutor declined to call a potential eyewitness to an altercation. In the judgment of Young CJ (which reflected the views of Murphy and Nathan JJ) his Honour stated (429):

> "The judgment [not to call the witness] seems to have been formed before the case began upon the basis of some inconsistent statements by the witness. The mere fact that a potential witness has made inconsistent statements will not generally be a reason for not calling the witness but unreliability may be supported by other considerations as well. In this case the learned judge at the outset described Goyen [the witness] as a crucial witness and so indeed she was. She was present at the time and an eyewitness to the striking of the deceased by the applicant. She was the only one of those present who was not called. Moreover, in an altercation of the kind that occurred, which as Goyen herself said happened so quickly, it is generally speaking important that all eyewitnesses are called."

It does not follow from that passage that it is incumbent upon a prosecutor to call a potential eyewitness on that basis alone. The question of the reliability of the witness still falls for consideration. In the present case the prosecutor, Sergeant Sean Carroll, set out the situation leading to his disinclination to call the witness Zogheib in an **[15]** affidavit sworn on 4 October 1996. The relevant portions of that affidavit are as follows:

> "10(b) That in his closing address Counsel for the Appellant submitted that the prosecution had failed to explain why ZOGHEIB had not been called and that there was no evidence to explain this failure. In response I informed the Court that I had advised the Appellant's legal advisers upon the first day of the hearing that I would not be calling ZOGHEIB to give evidence, but I would make him available to be called by the defence. I informed the Court that I was satisfied that ZOGHEIB was not truthful, was uncooperative, and was unwilling to testify to the facts.
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> (c) That I made my assessment of ZOGHEIB following a conversation with him on the first day of the hearing, in which he stated inter alia that he was going to 'fix you guys' at which time he refused to inform me as to what evidence he was going to give.
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> (d) That after the close of the prosecution case I informed Counsel for the Appellant that ZOGHEIB was at Court and available for him to speak to. He declined to take advantage of this opportunity and agreed ZOGHEIB could be excused."

In a subsequent affidavit sworn 12 November 1996 Sergeant Carroll elaborates on this matter as follows:

> "4(a) That at paragraph 10(c) of my original affidavit in reply I summarised a conversation between myself and the witness ZOGHEIB, which occurred on the first day of the hearing. My full recollection of that conversation is as follows–
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> (b) I put to ZOGHEIB the fact that the summary of the matter that he pleaded guilty to at the Children's Court was substantially different to the account which he gave in his police interview, wherein he stated that the Appellant was not present at the solicitor's office. I put to him that all other witnesses including **[16]** the Appellant had said that the Appellant was present at the solicitor's office, and I asked him what his evidence was going to be. He stated: 'I don't care man. You'll find out when I get in court, I'm going to fix the cops up they not going to get Tien.' I informed him that all I required was for him to tell the truth. He stated 'I'm going to fix you guys man. Tien didn't come in I don't care what I say as long as Tien will get off.' From his words and conduct I formed the opinion ZOGHEIB was not a witness to the truth. He was not prepared to tell me what his evidence was going to be. I decided that I would not call him because he was not a witness to the truth.
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> (c) I subsequently informed WILLIAMS [WILLIAMS was originally the instructing solicitor for the appellant in this matter] that I would not call ZOGHEIB as he was not a witness to the truth. I notified her that ZOGHEIB was under subpoena and he would be available if she wished to call him."

In response to the first affidavit of Sergeant Carroll Mr Kuek, in an affidavit sworn 11 November 1996, states:

> "5. In respect of paragraph 10(c) Sergeant Carroll's affidavit, I say that Mohammed ZOGHEIB had pleaded guilty to offences arriving (sic) out of the same incident and that a summary of his offences was in police possession."

I interpolate that Mr Kuek originally acted for Mr Zogheib and had had access to a taped interview he had made.

> "6. Paragraph 10(d) of Sergeant Carroll's affidavit is inaccurate. I was present when Sergeant Carroll spoke with counsel for Mr Tran. Counsel of Mr Tran did not decline to take advantage of any opportunity to speak with Mr ZOGHEIB and did not agree that Mr ZOGHEIB could be excused."

No affidavit material was forthcoming from either the counsel for the appellant or Ms WilliaMs According to the normal procedure adopted in these matters I see no reason not to accept the version of Sergeant Carroll of the facts influencing his decision which he put to the Court. **[17]** The factual material in this case went much further than that revealed in *Shaw's Case* and it cannot, in my view, be said that the decision of the prosecutor not to call the witness constituted an error of judgment. The information he had from the witness was that he would tailor any evidence he gave to achieve a particular result rather than giving truthful evidence.

On the material before me the prosecution not only explained the decision not to call the witness Zogheib but gave the appellant's legal representative advance warning of such a decision. It is also worth noting that any failure to call the witness Zogheib was not raised by the appellant's counsel during the course of the prosecution case but was solely the subject of a legal submission once all the evidence was concluded. Ground 2 should be answered "No".

Question 3 states:

> "Did the prosecution so intentionally conduct itself, by requiring the Appellant's instructing solicitor to leave the Court as a witness when the evidence sought to adduce from him was available from other witnesses, as to deprive the appellant of proper legal representation and, if so, did such conduct result in the Appellant's summary trial miscarrying."

It was submitted by Mr Burke, who appeared on behalf of the second respondent, that the question should more properly be whether the Magistrate erred in law in requiring Mr Kuek to remain out of Court rather than the motives of the prosecution. This may well be so but in any event the ultimate question is formulated in terms as to whether the appellant was deprived by the Magistrate's order of proper legal representation resulting in the summary trial miscarrying.

[18] It was put first by Mr Perkins that although s127 of the *Magistrates' Court Act* 1989 in relation to ordering witnesses out of Court was couched in mandatory terms it did not deprive the Court of a discretion. Reference was made to the decision of *Barry v Cullen* [1906] VicLawRp 66; [1906] VLR 393; 12 ALR 235; 27 ALT 227. Mr Burke, on behalf of the second respondent, agreed that a discretion did exist and in this view I think counsel are correct. It is certainly not clear on the material that the Magistrate felt himself bound to make such an order. There is a conflict of evidence as to whether Mr Kuek was the instructor when the order was made. In this regard I prefer the affidavit material of Sergeant Carroll. According to that affidavit there was no opposition to the order sought. At the time it was made Ms Williams was the legal representative instructing counsel for the appellant. It appears that on the afternoon of the second day of the contested hearing an application was made for the order to be relaxed, in the unexplained absence of Ms Williams, to allow Mr Kuek to remain in Court to instruct counsel. In his October affidavit Sergeant Carroll states he opposed that application:

> "9(b)(iv) on the bases that (a) the order had already been made; (b) KUEK was a witness under subpoena to give evidence in relation to the facts and be questioned by the defence; (c) the defence had full notice of the prosecution position and provided for it by assigning WILLIAMS to represent the Appellant; (d) it was not proper and in the interests of justice that a witness yet to testify remain in Court and listen to the evidence of other witnesses upon which he might later be called to comment. It was not put to the First Respondent [the magistrate] that the defendant would be prejudiced if the order was not relaxed to allow KUEK to instruct."

[19] Again I interpolate that Mr Kuek could clearly give evidence as to certain events at the Keilor Downs police station and, apparently, was also required to give evidence in relation to the failure of the appellant to answer bail – one of the charges he faced on this occasion. There is certainly not sufficient evidence before this Court to enable the conclusion to be drawn that the exclusion of Mr Kuek was motivated as a prosecution tactic.

The assertion that the issue of prejudice was not put to the Magistrate was not disputed in this Court. Rather, there was the broad assertion that without an instructing solicitor present in Court a defendant could not have proper representation. If this be so, then generations of defendants and accused persons in this State have not been properly represented.

In my view that proposition is palpable nonsense. If the presence of an instructor was considered vital to the conduct of this case then there was ample opportunity before it began, or by seeking an adjournment once it had commenced, for the appellant's solicitor to arrange for a substitute. Accordingly the answer to the question posed in Ground 3 is "No".

Although it was not one of the grounds settled by the Master for consideration by this Court, the applicant sought to argue a fourth ground which was set out as follows:

> "In the circumstances of the case, the learned magistrate erred in the exercise of his discretion when he: (A) Refused the applicant's application to make an informal tape-recording of the proceedings?
>
> **[20]** (B) Refused the applicant's application that the prosecution provide a licensed court recorder for the proceedings?"

No doubt the ground is meant to be read interrogatively. Mr Burke opposed the adding of this additional ground but in the event I permitted it to be argued reserving my decision as to whether it was legally possible in light of the provisions of Order 58 of the *Rules of Supreme Court*. Ultimately I am content to adopt the broad approach of Mandie J in *DPP v Hinch*, an unreported judgment dated 5/8/1994 (at pp21 and 22) and allow the ground to be argued. The background to this issue was a decision by Magistrate Spanos, who was the first Magistrate seized of this matter, that an informal taped record of the proceedings would be permitted.

It was first argued by Mr Perkins on behalf of the appellant that such a decision was binding upon Magistrate Klestadt. In aid of that submission he cited the High Court decision of *Rogers v R* [1994] HCA 42; (1994) 181 CLR 251; (1994) 123 ALR 417; (1994) 68 ALJR 688; 74 A Crim R 462. In that case, records of interview ruled as involuntary in relation to a number of charges at one trial were sought to be relied on in relation to further charges in a second trial. A majority of the Court (Mason CJ, Deane and Gaudron JJ) held that the tender of the record of interview would be a direct challenge to the 1989 determination and, in the circumstances, would be an abuse of process. What the Court was considering there was a factual ruling in relation to substantive evidence upon which liability for criminal offences could be founded. That is not the situation in the present case. Here the Court was dealing with a matter of practice and procedure relating to the method **[21]** of conduct of the case in the Magistrates' Court. In my view a procedural ruling of the nature made by Magistrate Spanos, which has nothing at all to do with the substantive hearing of the charges, but relates to the discretionary decision of a Magistrate as to the control of Court proceedings, is not inviolable and cannot be said to be binding on Magistrate Klestadt. (See also the approach of the English Court of Appeal in *R v Wright* (1990) 90 Cr App R 325).

Next it was argued that, in any event, the failure of the Magistrate to permit informal tape-recording was an error in the exercise of his discretion. The issue of informal tape-recording was considered in *Stefanovski v Murphy etc.* [1996] VicRp 78; [1996] 2 VR 442. It is, perhaps, sufficient to quote from the headnote.

> "There is no right in a party, or counsel or solicitor on behalf of the party, to tape-record proceedings in court; however, the judge may in the exercise of the discretion relating to the control of proceedings permit the use of such a tape-recording where the requirements of justice demand it."

In ruling on this matter, (Ruling 1), Magistrate Klestadt stated:

> "This is an application for permission to record these proceedings by means of tape-recording

> conducted by equipment possessed and operated by the applicant defendant's legal advisers. The prosecution, whilst conceding the potential benefit of an accurate record of proceedings, opposes the application on the ground, as I apprehend them, that the machine to be used, should the application be granted, is not adequate to provide such accurate record of proceedings. As is clear from the decision of the Full Court of the S/C in the Appeals of *Stefanovski* [and others].... the court has a discretion to allow **[22]** recording or not depending on the circumstances of the case. ....
>
> It is relevant to have regard to the purpose to which such a recording might be put in deciding whether the recording might promote convenience, expedition and efficiency in the administration of justice. In his submission before me Mr Perkins did not seek to have the recording used to provide running transcript, and in his evidence Mr Kuek referred solely to the use of recordings to provide a transcript of proceedings in this court for the proper preparation of advice and material for use in the Appeals Process.
>
> Whilst of course this is an entirely proper use of such tape-recording it brings into sharp focus the need for the gravest degree of accuracy possible and some of the risks in allowing unauthorised recording as set out in the judgment of Ormiston, J. ... and Teague, J. ...
>
> Having had an opportunity to view the machine which the solicitors for the applicant defendant proposes to use I am of the view that the issues raised by Ormiston, J. ... and by Teague, J. ... with regard to the adequacy of what Ormiston, J. refers to as 'single tape-recorders sold in retail shops' ... are relevant here and that I should heed the reservation expressed by the learned judges. It follows from the above that the application in its present form, is refused although I would allow recording of proceedings by a licensed or authorised operator using proper equipment ..."

In the event whilst a licensed shorthand writer was not procured, the Magistrate allowed a stenographer to take notes of the proceedings. Before this Court it was argued that it was necessary for a fair trial for the provision of a transcript or a tape-recording. It was asserted that without proper methods of obtaining a full record the right to effective assistance by counsel was very much reduced. **[23]** This of course is a different argument than was addressed to the Magistrate.

A further limb to the argument was that the ruling of the Magistrate prevented the appellant placing before this Court a proper record of the proceedings and effectively denied the party the right of appeal given to him. This, as I apprehend it, was said to invalidate the proceedings. Mr Perkins cited the case of *Pinkstone v Goldrick & Anor* [1979] 1 NSWLR 279. That was a case in which it was said by the Appeals Court that the failure of a Magistrate to keep a proper record of civil proceedings, including the evidence, invalidated those civil proceedings. Moreover, it was not followed in the subsequent case of *Sherring v Goldrick & Ors,* reported in the same Law Report at p285ff.

In any event in the present case the Magistrate took full notes which were supplied to the parties and exhibited before this Court. Finally, on this issue, counsel for the appellant failed to articulate before this Court (at least to my understanding) how any asserted error by the Magistrate in either refusing to permit the informal tape-recording, or to order the prosecution to organise any formal tape-recording, of the proceedings in the instant case could sensibly be said to result in the invalidation of the prosecution. Any such argument is totally without merit. Accordingly the answer to the questions raised in Ground 4 is "No".

APPEARANCES: For the Appellant: Mr D Perkins and Dr C Corns, counsel. Kuek & Associates, solicitors. For the Second Respondent: Mr T Burke, counsel. Peter Woods, solicitor for the DPP.
