40/97

SUPREME COURT OF VICTORIA

SAMUEL v THE MAGISTRATES' COURT of VICTORIA

Chernov J

13 June 1997

PROCEDURE – NATURAL JUSTICE – PROCEDURAL FAIRNESS – RELEVANT MATERIAL ON COURT FILES – REFERRED TO BY MAGISTRATE – NOT DISCLOSED TO PARTY – NO OPPORTUNITY GIVEN TO CONTROVERT MATERIAL – WHETHER PARTY ACCORDED PROCEDURAL FAIRNESS.

S. – who had had an intervention order made against him – applied to the court for a declaration that he be deemed "not a prohibited person". When hearing the application, the magistrate had access to material on the court files which cast serious allegations against S. The ambit of the intervention order was discussed; however, the magistrate did not inform S. of the relevant contents of the court files. The magistrate refused S's application. Upon originating motion to quash—

HELD: Application granted. Decision quashed. Remitted to the magistrate for further consideration. A court must accord a party the right to be heard or procedural fairness. In the present case, the magistrate was obliged to disclose to S. the material in the court files on which he relied so as to give S. an opportunity to controvert it. In failing to do so, the magistrate denied S. natural justice.

CHERNOV J: **[1]** This is an application by way of originating motion made pursuant to rule 56 of the rules whereby the applicant seeks orders in the nature of *certiorari* to quash the decision of Mr Docking constituting the Magistrates' Court at Heidelberg made on 26 March 1997 whereby he refused the application of the appellant for declarations under s189 of the *Firearms Act* 1996. The originating motion was filed on 20 May 1997. The applicant applied to the Magistrates' Court under s189 of the *Firearms Act* for a declaration that he be deemed "not a prohibited person", notwithstanding that an intervention order had been made against him. The application came on for hearing on 26 March 1997 before Mr Docking and the applicant appeared in person.

The material makes it perfectly plain that the magistrate tried on several occasions to persuade the applicant to have the matter adjourned and in fact the magistrate offered to adjourn the case for the purpose of the applicant obtaining legal advice as to the conduct of his case. For reasons no doubt best known to the applicant, these offers, which I should say were sensible offers, were refused by the applicant. Before the applicant gave evidence on oath, there was a discussion between the applicant and the magistrate as to how many intervention orders were made against the applicant and the nature of those orders. The applicant then gave evidence on oath which is set out in paragraph 14 of his affidavit sworn in this proceeding on 14 May 1997.

It seems that in that evidence to the magistrate the applicant dealt with, *inter alia*, matters which related to **[2]** the intervention orders in question. According to the applicant, the magistrate stated at the conclusion of the evidence that since there was no corroborative evidence to support what the applicant had been saying, he would not make the declaration sought. Mr Docking's answering affidavit, or affidavit in reply as he calls it, of 23 May 1997, so far as is relevant, makes it clear that he warned the applicant before he gave evidence that he would need, in effect, corroborative material because he said there were various allegations that were made against him in the applications for intervention orders and that this material was on the court files and the applicant had to overcome that material. The material from Mr Docking also makes it clear that at the conclusion of the applicant's evidence, that he, Mr Docking, having read the court files and the relevant intervention orders, and having had the opportunity of observing the applicant and hearing his evidence, refused his application. It is therefore fairly clear that the magistrate examined the court files and came to the conclusion that there were serious allegations made against the applicant which he, the applicant, had to overcome.

The case proceeded before me on the basis that failure by the magistrate to inform the applicant of the contents of the court files to which he had regard deprived the applicant of an

opportunity of a proper hearing or procedural fairness in the conduct of the case, and consequently, the magistrate had denied natural justice to the applicant. **[3]** I say deliberately that the case was conducted before me on that basis because if one looks at the originating motion and the particulars of the complaint, so to speak, contained in that document, it is difficult to find or discern such a ground. Nevertheless, to my mind, that is only a matter of form, because had an application to amend been made to encompass this ground in a more definitive way, it is unlikely that that would not have been granted, even if an adjournment would have been necessary. As I have said, in any event, the case was conducted on the premise that the principal complaint was the failure by the Magistrate to inform the applicant of the relevant contents of the court files, thereby depriving him of the opportunity of meeting what was notionally or otherwise in the Magistrate's mind against him.

There were two principal contentions by Mrs Davis who appeared for the respondent in relation to this. First, she submitted that not every breach of natural justice warrants the setting aside or quashing of the order made consequent upon a breach of procedural fairness. She cited *Stead v The State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141; (1986) 67 ALR 21; (1986) 60 ALJR 662; [1986] Aust Torts Reports 80-054; (1986) 4 MVR 542; (1986) 11 ALN N80 in support of that proposition, and it is true that the High Court there held that not every departure from the rules of natural justice would entitle the aggrieved party to a new trial.

The issues that arise in the context of whether a new trial should be ordered are quite different from the issues that arise in the case of a hearing such as the one that was held before Mr Docking where there is an obligation obviously **[4]** to accord procedural fairness to the applicant. But in any event, in *Stead's* case, the court did say where there was a denial of natural justice affecting the entitlement of the party or, I interpolate, the ability of a party to conduct its case properly, that it is difficult for a court to conclude that denial of natural justice would have made no or no practical difference to the conduct of the case in the ultimate decision that flowed from it.

In my view, Mrs Davis is correct that there were discussions between the magistrate and the applicant as to intervention orders and the ambit of those orders but in my opinion, that falls short of the applicant being appraised of what actual case he had to meet because he was not informed of what it was that the magistrate was taking into account in deliberating upon the application before him. In my view, therefore, the applicant did not have a full or fair opportunity of addressing the substance of the relevant matters in the files. It should also be borne in mind that despite the applicant's apparent stubbornness in not obtaining legal advice, he was obviously a lay person and he was unlikely to have been aware of his legal rights to demand from the magistrate information which would convey to him, the applicant, what relevant material was being referred to by the magistrate in his deliberations.

The second point to which Mrs Davis pointed was that in any event, the breach here was not of great moment and should be disregarded because it was unlikely to have affected the magistrate's decision having regard to the **[5]** opportunity which the applicant had to address him on the extent of the intervention orders. For reasons I have already given, I do not regard it as a matter of judging or trying to judge the quality of the breach of natural justice. There was a breach which in my view was a material one.

Rules of procedural fairness fall into two broad categories, the first deals with the requirement that the decision-making tribunal must not be biased, and the second deals with the requirement that it must accord the person in question the right to be heard, or, as is the current expression, procedural fairness. In my view, the second requirement in the context of this case obliged the magistrate to have disclosed to the applicant the material in the court files on which he proposed to rely and apparently did rely so as to give that applicant an opportunity to controvert it. If reference needs to be made to authorities to support that proposition, I refer to the case of *Kanda v Government of the Federation of Malaya*, decision of the Privy Council reported in [1962] UKPC 2; [1962] AC 322; [1962] 2 WLR 1153, where at AC page 337 Lord Denning said that,

> "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has

> been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."

Those words obviously are as true today as they were then and in my view, the magistrate has failed to comply with those basic requirements. It has been said by Mrs Davis that the applicant should have, as a matter of procedure, proceeded by way of **[6]** appeal under s109 of the *Magistrates' Court Act* and not by way of prerogative review. This point troubled me for some time particularly in light of the observations by the Full Court in *Stefanovski v Murphy* [1996] VicRp 78; [1996] 2 VR 442, particularly on pages 452 to 453 where reference is made to the decision of Brooking J in *M v M* [1993] VicRp 29; [1993] 1 VR 391 at 396 where Brooking J said that,

> "Judicial review under order 56 ought not to be seen as furnishing a means of appealing against decisions."

As Mrs Davis has pointed out, it is the fact that the remedy which is sought here is a discretionary one and one of the matters to which the court has regard is the alternative procedures which have been available to the applicant. Mr Simon, who appeared for the applicant, submitted that the applicant could not have appealed on a question of law under s109 because the magistrate did nothing wrong in the substantive aspect of the case. I am not persuaded that that is necessarily correct, but I do not have to decide that point having regard to the view that I have reached that I would not exercise my discretion against the applicant merely because he has chosen to seek an order in the nature of *certiorari*.

It is made plain by the High Court in *Craig v State of South Australia* [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595 particularly at 599; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359, that *certiorari* generally goes where there has been failure to observe some applicable requirement of procedural fairness. In my view, that has occurred in this case and therefore the decision of the magistrate ought to be quashed and the matter remitted back to him for **[7]** consideration according to law. That is the order I propose to make.

MR SIMON: A second order for costs including reserve costs. (Discussion ensued re costs.)

HIS HONOUR: I think costs ought to be ordered in favour of the applicant and I so order.

APPEARANCES: For the Plaintiff: Mr M Simon, counsel. Doyle & Kerr, Solicitors. For the Defendant: Mrs S Davis, counsel. Victorian Government Solicitor.
