**63/88**

**SUPREME COURT OF VICTORIA**

# *ZDERSKI v ELLIS*

**Southwell J**

**13 October 1988**

**NATURAL JUSTICE – DISQUALIFICATION FOR BIAS – PROSECUTOR IN MAGISTRATE'S CHAMBERS FOR 30 SECONDS – NO COMMUNICATION BETWEEN MAGISTRATE AND PROSECUTOR – WHETHER MAGISTRATE PREJUDICED – WHETHER DISQUALIFICATION APPROPRIATE – DRINK/DRIVING – BLOOD SAMPLE TAKEN AT HOSPITAL – PROOF THAT HOSPITAL A "DESIGNATED PLACE" – WHETHER TENDER OF *GOVERNMENT GAZETTE* NECESSARY – PRESUMPTION OF REGULARITY: *ROAD SAFETY ACT* 1986, SS47, 49(1)(g), 56, 57.**

**1. Where in order to search for a copy of a *Government Gazette*, a prosecutor and a court clerk entered the Magistrate's chambers for 30 seconds when the Magistrate was present, but no communication took place between the prosecutor and the Magistrate, neither the defendant nor the public could reasonably have apprehended that that event would have given rise to partiality or prejudice on the part of the Magistrate whereby disqualification was justified.**

***Re JRL; ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342; [1986] FLC 91-738; 66 ALR 239; (1986) 60 ALJR 528; (1986) 10 Fam LR 917; (1986) 10 ALN N184, applied.**

**2. On the hearing of a charge under s49(1)(g) of the *Road Safety Act* 1986, a presumption of regularity applies whereby it is not necessary for the prosecution to tender the relevant *Government Gazette* to prove that the hospital where the blood sample was taken was a "designated place" within s56 of the Act.**

***Mallock v Tabak* [1977] VicRp 7; (1977) VR 78; and**

***Wright v Bastin (No. 2)* [1979] VicRp 35; (1979) VR 329, referred to.**

**SOUTHWELL J: [1]** Return of an order nisi to review a decision of the Magistrates' Court at Oakleigh of 12 May 1988 whereby the applicant ("the defendant") was convicted of a breach of s49(1)(g) of the *Road Safety Act* 1986 ("the Act"). She was fined $300, her driving licence was cancelled, and she was disqualified from obtaining a licence for twelve months. *[After setting out the provisions of s49(1)(g), His Honour continued]*... **[2]** The course of proceedings at the Magistrates' Court was the subject of affidavits, from on the one hand the applicant, her counsel, and another witness, and on the other hand, the informant ("the respondent"), the prosecuting officer (Constable Story) and the Stipendiary Magistrate. Those versions differ markedly: for the purposes of this proceeding, I must accept as accurate the version put forward on behalf of the respondent, and by the Magistrate.

Evidence was given by a Dr Purcell of the taking of a blood sample from the defendant at the Moorabbin Hospital at 2110 hours on 15 August 1987: the defendant had a short time earlier received injuries when she lost control of a motor car being driven by her and it collided with a pole. The certificate of Dr Purcell was tendered in evidence pursuant to s57(3) of the Act. *[His Honour set out the provisions of s57(2) and (3) of the Act and continued]* ... **[3]** The precursor of sub-s(2) was s80D(1) of the *Motor Car Act* 1958 and of sub-s(3), s80D(3) of the latter Act. For present purposes, there is no significant change in terminology. The certificate was in fact in the form of the Sixth Schedule to the *Motor Car Act*, but with the heading altered. In cross examination Dr Purcell repeated that he had followed the procedures laid down by the relevant regulations, which were tendered in evidence, and no evidence was given in contradiction. Police evidence was given of an admission by the defendant of her driving of the car after taking some alcohol, of the accident, of being admitted to Moorabbin Hospital for treatment of her injuries, and of the taking of a blood sample.

At the conclusion of the informant's case, counsel for the defendant submitted that there was no case to answer, upon the basis that the prosecution had not proved that Moorabbin Hospital was a "designated place" within the meaning of s56 of the Act. *[His Honour set out the provisions of*

*s56 of the Act and continued]* ... **[4]** The prosecutor sought a short adjournment in order to obtain a copy of the relevant *Government Gazette* (p454 of the *Victoria Government Gazette* of 25 February 1987): although the affidavits do not specifically state that application was made to reopen the prosecution case, that is implicit in the application in fact made, and it follows from the fact that the Magistrate granted the adjournment that he was prepared to permit the prosecution to reopen its case.

When the Court rose, the prosecutor went to the clerk of court's office and spent about five minutes searching for the *Gazette*: she telephoned other police to establish the date of the *Gazette*: with two clerks and the informant, she resumed the search in the clerk's office. The Court co-ordinator, Mrs Matheson, suggested that the *Gazette* might be kept in the Magistrate's Chambers. The evidence shows that a number of books were kept in that **[5]** room, which is described in the affidavits as the "Magistrate's Chambers", and the "Magistrate's room". Mrs Matheson opened the door to the room: in the room, two to three metres from the door, the Magistrate was standing, speaking with another Magistrate: Mrs Matheson and the prosecutor, apparently without either addressing or being addressed by the Magistrate, began looking in the shelves in that room, while the informant stood just outside the open door. Counsel for the defendant stood close to the informant, he looked towards the Magistrate and their eyes met. Nothing was said by anyone to the Magistrate and he did not speak.

After about 30 seconds it became apparent to Mrs Matheson and the prosecutor that there were no volumes of the *Gazette* in that room, and they thereupon left, closing the door behind them. There is in that version no evidence of any communication between the prosecutor and the Magistrate: for the whole of the short time that the prosecutor was in the room, the Magistrate was in the sight and hearing of counsel for the defendant. Upon telephoning for further assistance, the prosecutor was promised a telefaxed copy of the *Gazette*, which was ultimately received in evidence.

Shortly after the events described above, and before the Court resumed, counsel asked the prosecutor to request that the Magistrate disqualify himself: she refused this request: upon resumption counsel submitted to the Magistrate that he should disqualify himself on the ground that during the adjournment the prosecuting police woman had **[6]** entered the Magistrate's Chambers while he was present: the Magistrate rejected the submission. The admissibility of the fax copy was briefly discussed, but since it had not then been received, the Court again adjourned. Counsel conferred with the defendant, who, for reasons which are not at all clear to me, terminated counsel's retainer. The defendant then sought a further adjournment to enable her to obtain the services of different counsel – that application was rejected. The Magistrate than admitted into evidence the fax copy of the *Gazette*.

The defendant gave evidence as to her consumption of alcohol, and as to her recollection of events at the hospital, which it is unnecessary to set out. The order nisi to review was granted on two grounds -

> "A. After receiving the Respondent and the police prosecutor in his Chambers during a period in which the hearing of the information of the Respondent against the Applicant stood adjourned, Counsel for the Applicant not being present, the Magistrate was wrong in refusing to disqualify himself from the further hearing of the information, because his having so received the Respondent and the police prosecutor gave rise to a reasonable apprehension that the Magistrate would not decide the case impartially or without prejudice.
>
> B. The Magistrate was wrong:
> (a) in not holding that there was no case to answer;
> (b) in convicting the Defendant -
> when there was no evidence that the place in which a sample of the Applicant's blood was taken was a **[7]** 'designated place', that is, a place specified in an Order made by the Governor in Council for the purposes of Section 56 of the said Act, and published in the *Government Gazette*."

For the defendant, Mr Ruta submitted that the mere entry of the prosecution into the private chambers of the Magistrate was sufficient to give rise to a "reasonable apprehension" that the Magistrate "might not bring an impartial and unprejudiced mind to the resolution of the issues". Those words are taken from *Re JRL; ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342; [1986] FLC 91-738; 66 ALR 239 per Mason J at p245; (1986) 60 ALJR 528; (1986) 10 Fam LR 917; (1986) 10

ALN N184. The Court was there considering a custody case where a Court counsellor who held firm views on the relevant issues, had spoken privately to the judge. Mason J after referring to *dicta* of McInerney J in *R v Magistrates' Court at Lilydale, ex parte Ciccone* [1973] VicRp 10; (1973) VR 122 at p127 (a case where the issue concerned the propriety of a Magistrate having travelled in a car from the Court to the *locus in quo* with counsel for one party and a witness) said -

> "The circumstances of each case are all important. They will include the nature of the communication, the situation in which it took place, its relationship to the issues for determination and the nature of the disclosure made by the judge.
>
> The problem is governed by the principle that a judge should disqualify himself from hearing, or continuing to hear, the matter if the parties or the public entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the issues: *R v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248 at 58-63; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11; *Livesey v New South Wales Bar Association* [1983] HCA 17; (1983) 151 CLR 288 at 293-4; 47 ALR 45; (1983) 57 ALJR 420). This principle, which has evolved from the fundamental rule of natural justice that a judicial officer should be free from bias, reflects a concern with the need to maintain public confidence in the administration of justice. **[8]** This concern is expressed in the cognate principle that, not only must justice be done, it must be seen to be done."

At p246 His Honour observed -

> "In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be 'firmly established' (*R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* [1969] HCA 10; (1969) 122 CLR 546 at 553-4; *Watson* at p262; *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12 at 14; 32 ALR 47 at 50). Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

And at p248 -

> "But the critical question is whether in all the circumstances the parties or the public would reasonably apprehend that the judge would not bring an impartial and unprejudiced mind to a hearing and determination of the custody proceedings between the parents of the child. Or to put it another way, the question is whether the principle that justice must be seen to be done requires that the judge be disqualified."

Before examining that "critical question", it is as well that I should note that the facts do not, in my view, substantiate the allegation in ground A of the order nisi that the Magistrate 'received' the ... prosecutor in his Chambers" (on the facts I must accept, the informant/respondent did not enter that room). It does not even appear whether Mrs Matheson knocked before entering, and as I have said, there was no communication between them.

In my opinion, it was most unwise for the prosecutor to have entered the room in which the Magistrate was known to be present, and unwise of the Magistrate not to have asked her not to come in, or to leave. However, (as Mr O'Bryan for the respondent submitted) the fair minded observer, knowing what had occurred, of the unsuccessful search for the *Gazette* in the office, of Mrs Matheson's suggestion that it might be found in the Magistrate's room, and knowing that there had in fact been no communication, could not reasonably have apprehended that this fleeting opportunity for communication, not in fact availed of, would be productive of partiality or prejudice. It was a brief search for a public document. Accordingly, neither the defendant nor the public had reason for that apprehension. The first ground of the order nisi has not been made out.

As to the second ground, Mr Ruta submitted that it had been made out, there being no proof that the Moorabbin Hospital was a "designated place" within the meaning of s56(1) of the Act. It was said that this follows from s57(9) which provides -

> "**[9]** Except as provided in sections 55(7) and 56, a blood sample must not be taken and evidence of the result of an analysis of a blood sample must not be tendered unless the person from whom the blood has been collected has expressed consent to the collection of the blood and the onus of proving that expression of consent is on the prosecution."

There was here no evidence that the defendant's consent had been sought or obtained. Mr O'Bryan relied upon a line of authority which holds that a presumption of regularity applies to render it not necessary to prove that Moorabbin Hospital was a "designated place": it is a rebuttable presumption, but no **[10]** evidence was put before the Magistrate to show that the hospital was not a "designated place".

In *Mallock v Tabak* [1977] VicRp 7; (1977) VR 78 Lush J was considering an analogous point under the *Motor Car Act*. There, the Schedule Six Certificate, was, apparently, not admitted into evidence, for the reason that the prosecution did not prove that the defendant had been "brought into a hospital for examination or treatment in consequence of an accident involving a motor car", within the meaning of s80DA(1) of the *Motor Car Act* (the precursor to s56(2) of the Act), there being no direct evidence that the defendant had received injuries. At p83 Lush J referred to the unreported decision of Gowans J in *Collins v Mithen*, where the latter had said -

> "In my view, the presumption of regularity should apply to justify the inference that the doctor who took the sample and gave that certificate was a doctor answering the description of sub-section (1) of s80DA, which authorized the taking of a blood sample, as otherwise an unlawful assault would have been comitted by the doctor on the defendant, and it is to be presumed that that was not the case."

Lush J quoted with approval from the reasons of Dean J in *Hardess v Beaumont* [1953] VicLawRp 46; (1953) VLR 315 at p320; [1953] ALR 656 where His Honour said -

> "It is always open to a defendant to rebut the presumption, but in the absence of some reason for supposing that there is some irregularity, legal practitioners should be discouraged from taking points based on the supposed formal defects in the informant's proof."

Finally at p85 Lush, J said -

> "In this case I am concerned with a statute which imposes duties on a class of responsible and disinterested persons which involve an invasion of the normal rights of the citizen. For that invasion immunity is granted to the class of **[11]** persons on whom the duty is imposed. The duty is imposed in specific circumstances, and the immunity will not be available except in those circumstances. It is to be expected in the context that the persons on whom the duty is imposed are instructed in and know their duty and the conditions of its exercise.
>
> In these circumstances it can, in my opinion, be presumed from the fact that a sample was taken in purported performance of the duty, that the conditions of the performance were satisfied. The situation is one in which the mind may be satisfied of the likelihood of correct observance of s80DA, and of the unlikelihood of lack of observance of its conditions.
>
> Accordingly, in my opinion there arises from the production of the Schedule Six certificate a rebuttable presumption that the sample to which it refers was regularly obtained."

That reasoning was accepted as correct by Menhennitt J in *Wright v Bastin (No. 2)* [1979] VicRp 35; (1979) VR 329 at pp338-9.

Mr Ruta submitted in reply that those authorities do not apply to the legislation presently under consideration: that s80DA(1) of the *Motor Car Act* referred to being "brought into a hospital for examination ...", whereas s56(2) refers to a "designated place", a term precisely defined by s56(1).

In my opinion, the changed terminology does not bring about the result for which Mr Ruta contends. Just as Lush J was concerned in *Mallock v Tabak* with a "statute which imposes duties on a class of responsible disinterested persons", so the Court here is concerned with almost identical legislation, the purposes of which are stated in s47, which provides -

> "The purposes of this Part are to—
>
> (a) reduce the number of motor vehicle collisions of which alcohol or other drugs are a cause; and
> **[12]** (b) reduce the number of drivers whose driving is impaired by alcohol or other drugs; and
> (c) provide a simple and effective means of establishing that there is present in the blood of a driver more than the legal limit of alcohol."

It is, in my view, unlikely in the extreme that Parliament intended to create technical

difficulties of proof which were not previously present. In this regard it is to be noted that Mr Roper, the Minister responsible for the carriage of the *Road Safety Bill* through the Legislative Assembly, said in the Committee stage of the debate, (*Hansard* Parliamentary Debates, Vol. 384, 12 November 1986, p2007), in referring to available defences "The technical defence industry has been growing in Victoria over recent years ... I am concerned that Parliament should remove the capacity for the technical defence industry that has developed".

It is true that the tendering of the *Gazette* would not "add greatly to the time and expense" in mounting the prosecution case (to quote Dean J in *Hardess v Beaumont* (*supra*)): it is also true that there is really no possibility of injustice in practice, for the reason that the question whether the place at which the sample was taken was a "designated place" can be just as easily disproved as it can be proved. If the Moorabbin Hospital was not a "designated place", then Dr Purcell, in taking the sample, was guilty of an unlawful assault. It must be presumed, in the absence of evidence to the contrary, that he was not so guilty.

Accordingly, it was not necessary for the prosecution to tender the relevant *Gazette*, and the **[13]** Magistrate was correct, albeit for a different reason, in holding that there was a case to answer. The second ground of the order has not been made out: the order nisi must be discharged with costs.

**APPEARANCES:** For the defendant/applicant Zderski: Mr Ruta, counsel. Comito & Co, solicitors. For the informant/respondent Ellis: Mr S O'Bryan, counsel. Victorian Government Solicitor.

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