18/00; [2000] VSC 71

SUPREME COURT OF VICTORIA

DPP v SAROSI

Harper J

11 February, 10 March 2000 — (2000) 110 A Crim R 376

NATURAL JUSTICE – SUMMARY HEARING – PROSECUTION EVIDENCE NOT FINISHED – AFTER LONG HEARING MAGISTRATE DISMISSED CHARGES – REASONS GIVEN FOR DISMISSAL – ONLY ONE REASON RELEVANT – NOTHING INHERENTLY INCREDIBLE IN EVIDENCE OF INFORMANT – FURTHER EVIDENCE TO BE CALLED RELEVANT TO MATTER RAISED BY DEFENCE – WHETHER MAGISTRATE IN ERROR IN DISMISSING THE PROSECUTION CASE BEFORE IT HAD BEEN CLOSED.

S. was charged with assaulting and hindering a police officer in the execution of his duty. The case was booked in for a one-day hearing. When the hearing was in its 27th day, the magistrate asked the prosecutor whether the evidence yet to be called would strengthen the prosecution case. The magistrate was told that it would. The following day, without inviting or receiving submissions on the future course of the proceeding and without giving notice of intention to do so, the magistrate dismissed the case against S. on the ground that the interests of justice were not being served by its continuance. The reasons given by the magistrate included:

(1) the length of time the hearing had taken
(2) the personal attacks on the prosecutor and defence counsel
(3) the evidence which had been led
(4) the expectation that the case could continue for a further inordinate time.

Upon appeal—

HELD: Appeal allowed. Remitted for hearing and determination by another magistrate.

1. The magistrate was in part, undoubtedly correct that the conduct of the hearing was not such as to advance the interests of justice. It is an inescapable duty of a magistrate to ensure that a trial does not continue for an inordinate time when judged against the nature of the charges before the court. No time is inordinate if the administration of justice according to law requires that such time be consumed. In other words, both prosecution and accused are entitled to a fair trial according to law and to the time required to achieve such an outcome.

2. Only one of the reasons (No. 3) given by the magistrate had any relevance to the question whether the prosecution case should be treated as at an end. When the case was dismissed, there were other witnesses to be called for the prosecution. There was nothing inherently incredible in the evidence given by the informant about the circumstances which gave rise to the charges faced by S. Even if the matters mentioned by the magistrate impacted adversely on the informant's credit, it did not follow that the magistrate would then necessarily be unable to be satisfied beyond reasonable doubt of the guilt of S. In any event, at this stage of the proceeding the question was not whether the magistrate was satisfied beyond reasonable doubt of S's guilt; it was whether or not the prosecution case should be summarily terminated.

3. It necessarily follows that the magistrate did not act in accordance with the law in stopping the prosecution case before it had been closed. Had the case proceeded, there was further evidence which was relevant to an issue raised by the defence. When the charges were dismissed the magistrate was not in a position to form a view about the prosecution case as would justify its dismissal.

HARPER J:

1. On 24 August 1996, George Sarosi ("the respondent") was charged with hindering a member of the police (Detective Sergeant David Barlow) in the execution of his duty. He was also charged with assault. The alleged victim was Mr Barlow. Both charges arose from the same incident. Accompanying Mr Barlow at the time was a Constable Casey. The substantive hearing did not begin until 23 February 1999, in the Magistrates' Court at Melbourne. It was booked in for one day. It ought to have been disposed of within that day, or perhaps slightly longer. On 28 April, when the hearing was in its 27th day, the magistrate asked the prosecutor, Senior Constable Sergio Petrovich, whether the evidence yet to be called by him would strengthen the prosecution case. She was told that it would. She made no further inquiries, and neither invited nor received

submissions on the future course of the proceeding. The following morning, having given no notice of her intention to do so, she dismissed the case against the respondent. A prosecution witness (Senior Sergeant K. Hammond) was then under cross-examination. Another prosecution witness, Senior Constable Cookson, had earlier begun his evidence but had been stood down shortly thereafter. Mr Cookson and another police member, Senior Constable Wilkins, had been with the respondent in the moments before Mr Barlow came upon the scene. It was the prosecution's intention to recall Mr Cookson in due course to give evidence about the demeanour of the respondent in the period immediately before the alleged assault on Mr Barlow took place. Mr Wilkins was also to be called. This evidence was relevant, so counsel for the Director submitted before me, because the conduct of the defence case put the behaviour of the respondent when confronting, and when confronted by, Mr Barlow, directly in issue.

2. In this, counsel for the Director was undoubtedly correct. The solicitor for the respondent admits as much. Indeed, the solicitor goes further. According to an affidavit made by him on 23 December 1999, he was instructed by the respondent that his client had been the victim of an unprovoked attack by Mr Barlow. The latter admits the attack, but maintains that it was his reaction to a push and to the threat of violent behaviour — manifested in particular by the respondent drawing back his fist as if to strike — on the part of Mr Sarosi. As any competent lawyer would, if asked, have explained to the respondent, the fact that he was attacked by Mr Barlow is not of itself necessarily a defence to a charge of an assault on Mr Barlow, or of hindering police. This is of course so if the facts are that the respondent's offences were completed before the assault on the respondent took place. It is the unprovoked nature of the attack on the respondent which is relevant to the defence. Accordingly, Mr Cookson's evidence (and that of Mr Wilkins) about the presence or absence of provocation on the part of the respondent in the moments preceding the incident itself was very much to the point even if neither man witnessed the alleged assault by the respondent. This would be particularly so were there to be any possibility that the respondent would allege that he was charged by Mr Barlow not because he had actually done anything wrong, but only because the police wished to put up a smokescreen behind which to hide their own misconduct towards the respondent. That this would eventually prove to be the respondent's case was certainly to be anticipated by the prosecutor and, indeed, had been suggested by the course taken in cross-examination by the respondent's counsel. The prosecutor therefore had every reason to recall Mr Cookson and to call Mr Wilkins.

3. It is not difficult to understand how the hearing took the torturous course which it did. The affidavit of the respondent's solicitor itself demonstrates, in the deponent, an extraordinary lack of tact, common sense and any appreciation of the way the legal system ought to operate. It also tells a tale of inexcusable obfuscation by the respondent's legal advisers. They, and in particular his counsel, a barrister of 28 years' standing (who did not appear on the appeal), transformed what ought to have been a straightforward hearing, after which the prosecution case may or may not have succeeded, into a travesty of the adversarial system of justice. Points good or bad were taken indiscriminately, and argued far beyond the point at which argument ought to have stopped. The prosecution was damned if it did and damned if it did not. Things were turned on their head to the extent that the production by the prosecution of photographs of the respondent was said to be part of a cover-up: see paragraph 131 of the affidavit of the respondent's solicitor. A subpoena was directed to the Ethical Standards Department of the Victoria Police, requiring the production of all police complaint files relating to all prosecution witnesses. One rationale for the issue of this subpoena was that it would show, "on a similar fact basis", that Mr Barlow had a propensity to violence: affidavit of Sergio Petrovich, paragraph 69. The truth that the rationale for the admission of "similar fact" evidence has nothing to do with attacks on the credit of prosecution witnesses was either forgotten or never understood. Here, Mr Sarosi's counsel apparently saw some tactical advantage in taking the concept to heights undreamt of in orthodox legal circles: it seems that he saw it as the springboard of an attack on the credit not of Mr Barlow alone, but of all prosecution witnesses. Somehow, the fact that Mr Barlow was not the man charged, and had in any event admitted striking the respondent, was lost in the morass which this hearing had become.

4. The litany of the improprieties which attended the proceedings in the Magistrates' Court does not end there. Issues of credit were raised at every juncture, and pursued without any regard for the proper limits upon such investigation. The use of notes to refresh the memory of a witness was the basis for attacks which generated much heat and little light. Points of law were taken

where none existed. Substantive hearing turned into *voir dire* and back again. All over an incident in a hotel car park which began and ended within a matter of minutes. Such was the constant barrage of vacuous, rambling and almost unintelligible submissions that, not surprisingly, the prosecutor and the magistrate lost all sense of direction.

5. In the end, the magistrate concluded that there must be a flaw somewhere in the prosecution case. She found it in two matters which had nothing to do with the central issues. At best, they went only to the credit of Mr Barlow. An examination of the relevant evidence for the prosecution demonstrates their lack of significance.

6. There seems to be no dispute about the fact that, shortly after midnight on 24 August 1996, the respondent was a passenger in a Holden Statesman sedan which, when approaching a mobile preliminary breath testing station in Johnston Street, Abbotsford, turned into the car park of the nearby Baghdad Hotel. Messrs Cookson and Wilkins, each of whom was a member of an interception unit working in conjunction with the breath testing station, followed. For reasons which went beyond the pursuit of a person suspected of a traffic offence, Messrs Barlow and Casey also attended. They arrived at the car park at about 12.15am. The respondent was then in the vicinity of the Statesman. On arrival, Mr Barlow (according to the account of his evidence given in an affidavit sworn on 27 May 1999 in this proceeding by Mr Petrovich) saw Messrs Cookson and Wilkins near that car talking to two men. He had a short conversation with Mr Cookson, during which he recognised the respondent as one of the two. Mr Barlow then searched the Statesman, and found two knives in the glove box. After finding these, he asked the respondent what he had in his pockets. The respondent answered by saying, in effect, that he would resist being searched unless the police had a relevant warrant. Mr Barlow replied that a warrant was unnecessary where the search was for drugs or weapons. He again asked the respondent to disclose what was in the respondent's pockets. The affidavit continues:

> "That at this stage the respondent was standing with both his hands in the pockets of a large coat that he was wearing. That as he [Mr Barlow] went to search the respondent, the respondent suddenly withdrew both his hands from the pockets of his coat, quickly raised his open left hand and pushed it against Detective Sergeant David Barlow's chest, whilst at the same time he drew his right hand back with a clenched fist in preparation to strike [him]. At this stage it was obvious that [the respondent] intended to strike him and as a reflex reaction he pushed him in the right shoulder with his left hand and struck him in the face with his right fist. This caused [the respondent] to fall to the ground."

7. Two other points in Mr Barlow's evidence assumed great significance. This had nothing to do with their inherent importance: had the case been fought as it should, it is unlikely that either would have been mentioned. Certainly, neither, whether taken separately or together, should have been relied upon by the magistrate as the basis for her decision.

8. First, Mr Barlow said that the respondent had not been photographed after the incident in which Mr Sarosi had received a black eye, admittedly as a result of being struck by Mr Barlow's fist. Secondly, Mr Barlow said that he returned to the hotel car park later in the morning of 24 August. He did so on the instructions of Senior Sergeant Hammond of Collingwood Police, following a complaint by the respondent to Mr Hammond. According to the complaint, the respondent had a microcassette with him when intercepted by the police at 12.15am. It had been stolen from him by them. Mr Barlow denied the allegation. Mr Hammond asked Mr Barlow to return to the car park of the Baghdad Hotel, and try to find the recorder. Mr Barlow did as instructed. The recorder was (according to Mr Barlow) found — damaged — at or near the scene of the earlier incident. The time at which, according to Mr Barlow, the recorder was returned to the Collingwood Police Station differed from the time of return as recorded in the station's books. The Patrol Duty Return for 24 August 1996[1] contains an entry against the time "4.15". Immediately above that entry, the Return reads: "Allegations of theft of tape appear false. Entered in M[iscellaneous] P[roperty] B[ook]". It is said by the respondent that this entry is proof that the microcassette recorder was brought to the station by Mr Barlow at some time before 4.15am on 24 August. According to the evidence given by Mr Barlow before the magistrate, however, the recorder was found in the hotel car park at some time after 5.00am.

9. The entry in the Patrol Duty Return is proof of nothing. It is ambiguous. Even if it means what the respondent says it means, there are many possible explanations for any discrepancy between the time identified by Mr Barlow and that suggested, by implication, in the Patrol Duty

Return. Only one such explanation is that Mr Barlow was deliberately dishonest. Nothing in the affidavit material before me, however, suggests any reason why Mr Barlow would seek to give untruthful evidence on this point. A false story that he returned to the Collingwood Police Station after 5.00am does nothing to support either his version of the earlier incident in the car park or his refutation of the allegation of theft. Moreover, if the discrepancy was not the result of any dishonesty on Mr Barlow's part, it was at worst an honest mistake. Such a mistake could do very little damage to his credit, if it affected his credit at all.

10. Mr Barlow was wrong when he said, in his evidence, that no photographs were taken of the respondent. Two such photographs were subsequently produced before the magistrate by Senior Sergeant Hammond. Again, however, the affidavit material before me does not necessarily point to any dishonesty on Mr Barlow's part. According to a note on the relevant police records, Mr Hammond was told by Mr Barlow that Mr Sarosi had been photographed. But the record may not accurately reflect the true position; someone else may have informed Mr Hammond that the respondent had been photographed, or (less likely) Mr Barlow may simply have forgotten that it was he who reported to Mr Hammond the fact that photographs had been taken. As with the record of the time at which the microcassette recorder was returned to the Collingwood Police Station, however, it cannot be said that Mr Barlow's evidence that no photographs were taken necessarily reflects adversely upon his credit. Even if it does, it does not necessarily reflect adversely upon his honesty. There is, in the material before me, nothing to indicate any motive on Mr Barlow's part to give untruthful evidence about this point. It is of course true that the photographs show the respondent with bruising around the eye; but Mr Barlow had, before the photographs were produced, admitted hitting Mr Sarosi in that region of the head.

11. It is not surprising that, by 28 April, the magistrate had become very concerned about the lack of progress in the case. The depth of her concern may be measured against her conclusion, reached no later than the following day, that the interests of justice were not being served by its continuance.

12. The magistrate was, in part, undoubtedly correct. The conduct of the hearing was not such as to advance the interests of justice. In *R v Wilson and Grimwade*[2], the Appeal Division of this Court described as "grotesque" the state which that proceeding assumed during the course of that trial. A similar adjective could with equal appropriateness be applied to the hearing before her Worship.

13. It is clear that, by the time the hearing had dragged itself into its 27th day, the magistrate had come to the same view. On 29 April 1999, without giving either party an opportunity to put to her submissions concerning her proposed course of action, she announced that the charges against Mr Sarosi would be dismissed. She had reached the conclusion, she said, that the case was "exceptional", and required "an immediate decision". She was, she said, "accordingly effectively treating the prosecution case as at an end."

14. Her Worship gave a number of reasons why, in her opinion, the case should be placed in the "exceptional" category. As set out in bullet-point form in her reasons for judgment, those reasons were:

> • the inordinate length of time it [the case] has been proceeding when one considers the nature of the charges before the court;
>
> • the serious allegations and the personal attacks which have been made on the credibility of the prosecutor and of defence counsel and which have now reached a crescendo wherein the issue of the prosecutor remaining in the matter has arisen;
>
> • the evidence which goes to the heart of the essential elements of the offences has been led;
>
> • the expectation that given the applications that have been foreshadowed, this case could continue for a further inordinate amount of time.

Her Worship concluded this portion of her judgment by saying that in her opinion "the interests of justice are not being served by this proceeding continuing any further."

15. Only one of the points articulated by her Worship (that the evidence going to the essential elements of the offences had been led) has any relevance to the question whether the prosecution case should be treated as at an end; and even that relevance is based upon the incorrect premise that the question itself is legitimate. The other points are wholly irrelevant. It is an inescapable duty of a judge or magistrate to ensure that a trial does not continue for an inordinate time when judged against the nature of the charges before the court. No time is inordinate if the administration of justice according to law requires that such time be consumed. In other words, both accused and prosecution are entitled to a fair trial according to law; and both prosecution and accused are likewise entitled to the time required to ensure such an outcome. But neither accused nor prosecution are entitled to take up time unnecessarily. Each judge and magistrate must so control the hearing that, as far as possible, it is properly confined. If it is not, the fault will in part be that of the court; and the solution will never be to end the case without giving the losing party the right to call whatever remaining relevant evidence that party wishes to call. It is to so control the balance of the proceeding that further time is not wasted.

16. In dismissing the case against the respondent, her Worship did not proceed merely on the basis that the hearing had become an ungovernable monster. She also considered the merits. She did so after examining a number of authorities. Among these were *Benney v Dowling*[3]; *R v Prasad*[4]; *Haw Tua Tau v Public Prosecutor*[5]; and *Doney v R*[6]. None of these, however, involved the delivery of judgment before the end of the prosecution case. They are therefore of no direct relevance. None of them justify the course which the magistrate adopted in dismissing the case against Mr Sarosi. None of them even hint that a case may ever be stopped before all relevant prosecution evidence has been called. On the contrary, each stresses that dismissal of the prosecution case after it has been closed, and before hearing from the defence, is a step only to be taken in very limited circumstances. If there is some evidence (not inherently incredible) which, if the judge or magistrate were to accept it as accurate, would establish each essential element in the alleged offence, then a "no case" submission must fail unless (in a case tried without a jury) the magistrate considers that the evidence is so lacking in weight and reliability that no reasonable tribunal could safely use it as the basis for a conviction.

17. There is nothing inherently incredible in the evidence given by Mr Barlow about the circumstances which gave rise to the two charges faced by the respondent. Moreover, to the extent that her Worship held that that evidence lacked weight and reliability, she based that finding upon two matters which, when properly analysed do not, or at least do not materially and adversely, affect Mr Barlow's credit.

18. In her reasons for dismissing the prosecution's case her Worship said, among other things:

> "It seems to me that ... evidence has been given of a number of matters which raise sufficient doubt in my mind that there is an issue as to the reliability of the evidence of the prosecution witnesses. In particular, there are discrepancies which I consider to be of significance concerning the following issues: (1) The informant Detective Sergeant Barlow's evidence that no photographs were taken. On or about 31 March 1999 two photographs of Mr Sarosi's injury to his right eye were located and produced to the court by the prosecution. (2) The circumstances of the finding of the tape recorder including the entry in Senior Sergeant Hammond's Patrol Duty Return of the entry of the tape recorder in the Property Book. I am unable to be satisfied beyond reasonable doubt as to the guilt of the defendant, Mr Sarosi, in relation to both charges."

19. I have already given my reasons for concluding that each of the two points articulated by her Worship went only to Mr Barlow's credit, if either was relevant at all. Even given that proper consideration of either or both points impacted adversely on his credit, it did not follow that the magistrate would then necessarily be unable to be satisfied beyond reasonable doubt of the guilt of the respondent. In any event, at this stage of the proceeding the question was not whether the magistrate was or was not satisfied beyond reasonable doubt of the guilt of the respondent; it was whether or not the prosecution case should be summarily terminated.

20. The matter may be considered from a slightly different angle. Had the prosecution case been closed on 27 April, her Worship would not in my opinion have been in a position to uphold a "no case" submission on behalf of Mr Sarosi. Messrs Barlow and Casey had given evidence, not inherently unbelievable, which if believed beyond reasonable doubt would form an adequate basis for a finding that each element of each charge had been proved. It necessarily follows that

her Worship did not act in accordance with law when she stopped the prosecution case before it had been closed. I am strengthened in this conclusion by my findings that the evidence which the prosecution would have called, had the case proceeded, being further evidence from Messrs Hammond and Cookson as well as the evidence of Mr Wilkins, was relevant at least to the issue, raised by the defence, of the respondent's behaviour immediately before the events described by Mr Barlow.

21. It was argued before me that the prosecution was estopped from asserting any relevance in the evidence of either of the three witnesses (Messrs Cookson, Hammond and Wilkins) to whom I have just referred. This is based upon the proposition that, at different points during the course of the hearing, the prosecution asserted the irrelevance of the evidence of each witness. But even if one concedes that the prosecution did on occasions take that position, it did not do so consistently; and even if it did, an estoppel would not arise.

22. In civil proceedings the doctrine of estoppel is designed to protect a party from the detriment which would flow from that party's change of position if the assumption or expectation that led to it were to be rendered groundless by another: *Waltons Stores (Interstate) Ltd v Maher*[7]. This is not to say that the doctrine as such is of assistance in determining whether a party to such a proceeding should or should not be permitted to call a particular witness or witnesses. The detriment which might flow from a change of position in this regard, and the measures which are open to avoid or minimise that detriment, are not in the ordinary course (if ever) examined with the principles of the doctrine consciously in mind.

23. If, in the present case, there were a change of position on the part of the prosecution, then the remedy might be an adjournment, with or without costs; or, in an extreme case, a stay of proceedings. The principles governing the decision of the court in such circumstances would doubtless be comparable to those applicable where estoppel is the issue. In particular, in both cases the court would be seeking to reach whatever conclusion is demanded by considerations of justice administered in accordance with the law. In a criminal as in a civil case, however, the principles of the doctrine of estoppel as such would not be called upon for assistance.

24. It seems that, on a day between 21 January 1999 and 23 February 1999, the respondent was provided with a list of the names of the persons whom the prosecution intended to call as witnesses Messrs Cookson, Wilkins and Hammond were included on the list. Mr Cookson was, according to this document, to give evidence "of interception of vehicle on 24/8/96 in which Sarosi was a passenger; evidence of driver absconding; evidence of demeanour of Sarosi." Mr Wilkins was to corroborate Mr Cookson. It was intended that Mr Hammond would give evidence of a conversation or conversations which he had with the respondent on 24 August, including a conversation which took place at the time the attendance register was completed.

25. In other respects, as the affidavit material before me makes plain, the prosecution did not take a consistent position in relation to the evidence in question. It was at various points during the hearing said to be irrelevant, but only in the limited sense (as the prosecution now submits) that none of Messrs Hammond, Cookson or Wilkins saw the incident involving the respondent and Mr Barlow. Otherwise, however (as the prosecution argues) its attitude towards the relevance of the evidence in question depended on the way it perceived that the respondent was putting his case. Working this out was no easy task, given the lack of any coherent approach on the respondent's counsel's part. Indeed, there were occasions when counsel for the respondent demanded that one or other or all three of those witnesses be called: see, for example, paragraphs 57 and 93 of Mr Petrovich's affidavit. Neither paragraph is challenged by the respondent's solicitor in his affidavit in reply affirmed on 23 December 1999.

26. Even if the doctrine of estoppel were applicable in criminal proceedings, the prosecution cannot be estopped from calling persons whose attendance as witnesses was notified to, and sought by, the respondent. In my opinion, the estoppel point has no substance.

27. It was also argued on behalf of the respondent that, even if believed, Mr Barlow's evidence did not cover each of the elements of each charge. Again, I disagree. In my opinion, a police officer is clearly hindered in the execution of his or her duty when a request to search a suspect is met by a push to the shoulder and a fist poised as if ready to strike. Such actions, in my opinion, also (if proved) amount to an assault.

28. The magistrate's position on this point is unclear. She said, in her reasons for judgment, that she could not "be satisfied beyond reasonable doubt that the prosecution can prove that Detective Sergeant Barlow's duty was made substantially more difficult of performance due to Mr Sarosi's conduct." She may by this mean that, even if believed, Mr Barlow's evidence does not amount to evidence of all the elements of the charge of hindering police; or she may mean that, while Mr Barlow's evidence would if believed beyond reasonable doubt prove each element of the charge, she did not accept that that evidence reached that standard. Either way, the magistrate was at that point in the hearing not in a position to form a view about the prosecution case such as would justify its dismissal.

29. It follows that the appeal must succeed. Not only was her Worship not justified in stopping the prosecution case without giving either party the right to be heard on whether or not it should be stopped, but she also failed to act in accordance with law in proceeding to dismiss the case against the respondent. It must, I think, be said that there was as little justification for either course as there was for the hearing to take the grotesque path which it did. The proceeding must be referred back to the Magistrates' Court to be dealt with, by another magistrate, in accordance with these reasons for judgment and in accordance with law.

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[1] The page in question is dated "23.04.96", but since entries in it were made very early in the morning, and since the preceding and succeeding pages are each dated "24.08.96", a reasonable assumption is that the former date is incorrect.
[2] [1995] VicRp 11; [1995] 1 VR 163 at 176; (1994) 73 A Crim R 190
[3] [1959] VicRp 41; [1959] VR 237; [1959] ALR 644.
[4] (1979) 23 SASR 161; (1979) 2 A Crim R 45.
[5] [1982] AC 136; [1981] 3 All ER 14; [1981] 3 WLR 395.
[6] [1990] HCA 51; (1990) 171 CLR 207; 96 ALR 539; (1990) 65 ALJR 45; 50 A Crim R 157; [1990] LRC (Crim) 416.
[7] [1988] HCA 7; (1988) 164 CLR 387; (1988) 76 ALR 513; (1988) 62 ALJR 110; [1988] ANZ Conv R 98.

APPEARANCES: For the appellant DPP: Mr CJ Ryan, counsel. Office of Public Prosecutions. For the respondent Sarosi: Mr G Nash QC with Mr S Lindner, counsel. Kuek & Associates, solicitors.
