22/04; [2004] VSC 265

SUPREME COURT OF VICTORIA

RUMBELOW v MAGISTRATES' COURT of VICTORIA & TAN CAO

Harper J

28 July, 2 August 2004 — (2004) 2 AWR 2.217

CRIMINAL LAW – WORKERS' COMPENSATION CLAIM – PAYMENTS RECEIVED WHILST WORKER EMPLOYED – WORK DONE BY DEFENDANT IN SELF-EMPLOYMENT CAPACITY – DECLARATION SIGNED BY WORKER TO EFFECT THAT HE WAS NOT ENGAGED IN ANY FORM OF EMPLOYMENT – WORKER CONTINUED TO RECEIVE WORKERS' COMPENSATION PAYMENTS – EMPLOYER NOT NOTIFIED OF WORKER'S SELF-EMPLOYMENT – CHARGES LAID – DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *ACCIDENT COMPENSATION ACT* 1985, SS123(3), 242(5), 249(1)(2).

C. was injured at work when he was employed by a company which supplied window tinting to cars. Whilst in receipt of the benefits, C. carried out window tinting from his home on 9 August. After that date C. continued to receive the benefits, failed to notify his employer of his self-employment and signed a declaration to the effect that he had not been engaged in any form of employment.

C. was later charged with breaches of the *Accident Compensation Act* 1985. At the hearing, the magistrate upheld a 'no case' submission in relation to three of the charges on the ground that there was no evidence of C.'s performing any work prior to the 9 August. The magistrate dismissed the remaining charges on the ground that the evidence was insufficient to conclude that C. made the fraudulent statements as alleged. Upon an originating motion to quash—

HELD: Application granted. Orders quashed. Remitted for determination according to law.
1. In relation to the first three charges, there was evidence which formed an ample base on which to found the inference that a business was being conducted on the relevant dates. The work done on 9 August did not negate the inference that C. was involved in the conduct of a continuing business. Accordingly, the 'no case' submission could not, as a matter of law, succeed.

2. The remaining charges related to the fraudulent obtaining of payments which followed the signing by C. of a declaration that he had not been engaged in any form of employment. In giving reasons which concentrated on criticisms of the prosecution evidence, the magistrate failed to address the allegations that the payments were made to C. after he had done work on 9 August and accordingly, were fraudulent in that they were obtained by submitting the false or misleading patient declaration. The magistrate failed to deal with the real issues between the parties and as a result, the orders made by the magistrate were quashed.

HARPER J:
1. On 21 March 2002, Mr Tan Cao suffered an injury at work. He was then employed by a company which traded as "Mr Windscreens". It is, or was at the material times, managed by Mr John Hoyne. When asked in evidence given before the Broadmeadows Magistrates' Court on 10 November 2003 what its business was, Mr Hoyne replied: "We do windscreens, window tinting and sun roofs." Mr Cao was employed as a "tinter". It was put to Mr Hoyne in cross-examination that Mr Cao performed some part-time window tinting "at home for mates and others". The witness said in answer that he "assumed" that this was so.

2. For some time after suffering his injury, Mr Cao was legitimately in receipt of workers' compensation benefits. But by August 2002, the relevant insurers were apparently becoming suspicious. On Wednesday 7 August, an agent for the insurers (Mr Glenn Lockwood) made an appointment with Mr Cao. The arrangement reached between them was that, on the following Friday (9 August) Mr Lockwood would deliver a vehicle to Mr Cao's address at 52 Longford Crescent, Coolaroo. Mr Cao would then apply tint to its windows.

3. The appointment was kept. At about 9.00 a.m. on Friday 9 August 2002, Mr Lockwood arrived at Longford Crescent with the car. It was placed in a garage on the premises. The garage contained a large amount of tinting film and was equipped with UV lights.

4. By 12.15, or thereabouts, the job was done. Mr Lockwood returned. Mr Cao showed him the vehicle with its newly-tinted windows. According to evidence given before the Magistrates' Court by Mr Lockwood, he was told by Mr Cao that the normal charge was $200 "but $180 would be nice". That amount was paid. A request for a receipt was refused. On the other hand, a business card, now in evidence, was produced. It is headed "Professional Car Tinter", and invites the reader to telephone "Tan" for an appointment. Two telephone numbers are provided. The address given is "Coolaroo." According to Mr Lockwood, Mr Cao added: "I work for cash. No receipt, I can't give you a receipt", and suggested that, if Mr Lockwood had any friends with vehicles ripe for tinting, Mr Cao would welcome a call, at any time.

5. If believed, this evidence establishes that Mr Cao was employed (albeit probably self-employed) on 9 August 2002. Moreover, according to the plaintiff's summary of evidence, it was not to any material degree challenged in cross-examination; and Mr Cao called no evidence.

6. It is in these circumstances that another item of evidence must be assessed. There was before the Magistrate a form headed "WorkCover Certificate of Capacity". It is dated 29 August 2002, and includes a segment headed "Patient Declaration". Mr Cao admitted that the declaration had been signed by him. It contained an assertion that he had not "been engaged in any form of paid employment, self-employment or voluntary employment since the last continuing Certificate of Capacity was issued." There was a further declaration that the details given by Mr Cao on the certificate were true and correct.

7. The certificate was the subject of the last of seven counts made returnable before the Broadmeadows Magistrates' Court on 10 November 2003. By count 7, the informant charged that on or about 29 August 2002 at Coolaroo Mr Cao "provided false or misleading information under the Accident Compensation Act 1985 namely WorkCover Certificate of Capacity No. 57620323." The following particulars were also given:

> "In relation to charge 7, on or about 29 August 2002 at Coolaroo in the State of Victoria, the defendant provided false and misleading information under the Accident Compensation Act 1985 in that he declared in WorkCover Certificate of Incapacity [sic] No. 57620323 that he had 'not been engaged in any form of employment, self-employment or voluntary employment since the last continuing Certificate of Incapacity was issued' in circumstances where, on 9 August 2002, he was self-employed as a car tinter."

8. The Court also heard that, on each of six occasions (10 August, 17 August, 24 August, 31 August, 7 September and 14 September 2002) Mr Cao had, on his own admission, received payments of compensation from "Mr Windscreens". These were the subject of counts 1-6 which, in addition to count 7, were before the Court on 10 November last year.

9. The informant himself gave evidence. He also called Mr Lockwood, together with another insurance agent (Mr Peter Sedawie), and Mr Hoyne. I have already noted that no evidence was called by Mr Cao.

10. Particulars were given of counts 1-3. They read as follows:

> "In relation to charges 1, 2 and 3, the defendant at Coolaroo in the State of Victoria fraudulently obtained payments from his employer ... on 10 August 2002, 17 August 2002 and 24 August 2002 respectively by failing to disclose to his employer ... that he was engaged in employment and capable of being employed."

11. Mr Hoyne gave evidence that Mr Cao never told him that Mr Cao had returned to work.

12. The relevant statutory provisions are to be found in the *Accident Compensation Act* 1985. Section 123(3) is concerned with a worker who, like Mr Cao, has been receiving weekly payments on the basis that he has no current work capacity. The sub-section provides that, if such a person returns to any work (including work as a self-employed person) then the employer in whose employment the injury occurred must immediately be notified of that fact. Failure to comply with this provision renders the offending worker liable to the penalties prescribed by s242(5): namely, 10 penalty points for a first, and 20 for a second or subsequent, offence. Moreover, s248 provides that a person must not obtain or attempt to obtain fraudulently any payment under the Act. The

penalty is 100 penalty units or imprisonment for two years. Similarly, s249(1) provides that a person must not give false or misleading information under the Act. The penalty for a breach is 20 penalty units or imprisonment for one month. By s249(2), a person must not make a statement (knowing that it is false or misleading in a material particular) in a medical certificate or other document that the person knows may accompany or be supplied in connection with a claim for compensation. Here, the penalty is 50 penalty units or imprisonment for 12 months, or both.

13. The Magistrate dismissed each of counts 1 (10 August), 2 (17 August) and 3 (24 August) on the basis that Mr Cao had no case to answer. The Magistrate accepted a submission that there was no evidence of other than one occasion on which the defendant was employed - that occasion being 9 August. Her Worship said:

> "In relation to those first three charges, I am not satisfied that there is any evidence before the Court of work performed prior to the visit of Lockwood on 9 August and, in accordance, that there is no case to answer in relation to those first three charges."

14. That passage encompasses everything that the Magistrate said on the "no case" submission. Yet evidence of work performed before 9 August was neither an element of the offence nor a fact which it was necessary to prove if the offence was to be made out. The informant sought to sustain counts 1-3 by proving that on the relevant dates the defendant was carrying on a business - and was therefore engaged in employment in the three weeks following 9 August - without informing his employer of that fact. In these circumstances, it was alleged, he committed a fraud which resulted in the impugned payments being made and received.

15. The informant called evidence which, if believed, formed an ample base on which to found an inference that a business was indeed being conducted by the defendant on the relevant dates. The best that the defendant could do to counter that inference was to suggest that Mr Hoyne's "assumption" of extra-curricular out of hours work, pre-injury, explained the presence in Mr Cao's garage of the wherewithal with which to tint car windows. But this does not answer the unchallenged evidence that Mr Cao was (self) employed on 9 August, or negate the inference that he was then involved in the conduct of a continuing business. It follows that a "no case" submission could not, as a matter of law, succeed.

16. Apart from count 7, the remaining counts faced by Mr Cao on 10 November last alleged that on, respectively, 31 August, 7 September and 14 September 2002, the defendant fraudulently obtained a payment under the Act from "Mr Windscreens". These counts therefore mirrored the first three. The latter are, however, to be distinguished in that they followed the signing by Mr Cao of the declaration contained in the WorkCover Certificate of Capacity. The relevant particulars, as provided by the informant, are in the following terms:

> "In relation to charges 4, 5 and 6, the defendant at Coolaroo ... fraudulently obtained payments from an employer ... on 31 August 2002, 7 September 2002 and 14 September 2002 respectively by submitting the false or misleading Certificate of Incapacity [sic] [No. 57620323]."

17. Her Worship dismissed these counts. At the same time, she also dismissed count 7. The initial segment of her reasons for taking this course was not recorded by the transcript provider. I must, accordingly, rely for the missing portion on notes taken by the solicitor acting for Mr Cao. It is accepted that these notes are accurate. They reveal that the Magistrate was not satisfied that certain video film tendered by the informant accurately depicted the scenes they were intended to record. She also criticised the evidence of Mr Lockwood as being vague; it was, in her Worship's opinion, affected by the circumstance that he was involved in some 100 investigations per year. As recorded in the transcript, the Magistrate continued:

> "The court found his [Mr Lockwood's] evidence to lack necessary detail and to be most unreliable. Accordingly, the evidentiary weight that can be accorded to the video evidence is negligible and that of Mr Lockwood's evidence of conversations is minimal, at best. Furthermore, the court heard that a Mr Sedawie, the boss of Mr Lockwood, accompanied him on 9 August. Mr Sedawie gave evidence which directly contradicted that of Mr Lockwood in a number of respects, centrally that he firmly asserted that he had attended the premises of the defendant in company with Mr Lockwood. ... [Mr Sedawie's] evidence cannot be relied upon to assist the prosecution case. Given the poor quality of the evidence given by the prosecution witnesses, the court cannot be satisfied beyond reasonable doubt that the sequence of events outlined did occur. Accordingly, the court is unable to conclude that

> the defendant is guilty nor made the fraudulent statements alleged and accordingly, the defendant is not guilty of the offences charged and charges 4 to 7 will be dismissed."

18. Subject to the caveat about the fault in the recording, I have set out above the full transcript of her Worship's reasons. They fail to touch upon the alleged falsity of Mr Cao's declaration in the WorkCover Certificate of Capacity which is the subject of count 7. That evidence not having been challenged, and there being no reason to disbelieve it, her Worship's reasons do not even begin to sustain her dismissal of that count. The reasons concentrate on criticisms of evidence that was, at best, of little relevance. The question whether Messrs Lockwood and Sedawie entered the premises together or separately is, for example, of no importance except perhaps on issues of credibility. But there were no such issues, at least not as they affected the unchallenged evidence that Mr Lockwood arrived in a vehicle with untinted windows, left it in Mr Cao's hands, and collected it, complete with tinting, from him a few hours later.

19. It follows that the Magistrate, in giving the reasons for her decision, failed to address the allegation that the payments made on 31 August, 7 September and 14 September (all of which payments were admitted) were fraudulent in that they were obtained by submitting the false or misleading patient declaration. It is certainly arguable that, if a truthful declaration had been made, the impugned payments would not have been forthcoming.

20. By her failure to deal in her reasons for judgment with the real issues between the parties, her Worship has placed this Court in a position where it should, in my opinion, grant the relief sought by the informant. That relief, as set out in the amended originating motion filed on 26 February 2004, is for an order in the nature of certiorari to bring up and quash the orders made by her Worship on 10 November 2003, and remit the matter to the Magistrates' Court to be further dealt with according to law. For these reasons, that relief will be granted.

APPEARANCES: For the plaintiff Rumbelow (Victorian Workcover Authority): Mr P Tehan QC with Mr S Cash, counsel. Victorian Workcover Authority. For the second defendant Tan Cao: Mr N Robinson, counsel. Secombs solicitors.
