[1980–87 Gib LR 245]

R. v. STIPENDIARY MAGISTRATE, EX PARTE C, P and S

SUPREME COURT (Alcantara, A.J.): August 13th, 1984

Evidence—witnesses—witness summons—may issue witness summons if witness unwilling to attend voluntarily—magistrate to decide how to establish lack of voluntariness, e.g. can request evidence on oath or accept counsel's word

The applicants sought judicial review of a decision of the Stipendiary Magistrate to issue six witness summonses against them.

Two young girls alleged that they had been indecently assaulted by the same man. Their parents reported the alleged assaults to the police, who took statements from both girls, their parents, and another girl who was able to give relevant evidence. The parents of the girls who had allegedly been assaulted, however, were anxious that their daughters should not have to give evidence in court. The man was subsequently charged but unexpectedly pleaded not guilty. He was granted bail and the case was adjourned. Before it was due to be heard, the parents made statements to the effect that, in seeking to protect their daughters, they did not want the case to proceed. At the hearing, none of the witnesses appeared and, at the request of Crown Counsel, the Stipendiary Magistrate issued six witness summonses on the basis that the witnesses could give relevant evidence but would not come to court voluntarily. The applicants sought judicial review of the decision.

They submitted that the summonses should not have been issued as (a) they had not been advised that their presence was required in court on the day of the hearing; (b) the Stipendiary could not have satisfied himself that they would not come to court voluntarily as there had been no due inquiry into the matter; (c) he should have requested evidence on oath to satisfy himself of their lack of voluntariness to give evidence; and (d) in the case of the two girls who had allegedly been assaulted, he should have used his discretion not to issue a witness summons if it could result in psychological harm.

The intervenors submitted that it would have been wrong for the Stipendiary not to have issued the witness summonses simply because there might have been difficulty enforcing them against individuals who did not want to come to court voluntarily.

Held, setting aside the witness summonses:

The witness summonses would be set aside, as they had been made on

the basis of incorrect information supplied by counsel, that all of the witnesses had refused to attend the hearing voluntarily. The witnesses had in fact been unaware that their presence was required on the day of the hearing and whilst it was true that the two girls who had allegedly been assaulted would not have been permitted by their parents to give evidence, the Stipendiary could not have been certain that the other witnesses would have refused to give evidence voluntarily. In spite of this, however, he had acted correctly in issuing the witness summonses. It was entirely for him to decide how he satisfied himself that the witnesses would not come to court voluntarily—he could request evidence on oath or accept counsel's word as he had done here (paras. 12–16).

Cases cited:
(1) *R.* v. *Greenwich JJ., ex p. Carter*, [1973] Crim. L.R. 444, considered.
(2) *R.* v. *Lewes JJ., ex p. Gaming Bd. for G.B.*, [1972] 1 Q.B. 232; [1971] 2 W.L.R. 1466; [1971] 2 All E.R. 1126, considered.

Legislation construed:
Magistrates' Court Ordinance (Laws of Gibraltar, *cap.* 95), s.28(1): The relevant terms of this sub-section are set out at para. 14.

C. Finch for the applicants;
J. Nuñez, Crown Counsel, for the intervenors.

1 **ALCANTARA, A.J.:** This is an application for judicial review. The court is being asked to set aside six witness summonses issued by the magistrates' court on May 23rd, 1984.

2 A 10-year-old girl complained to her mother that she had been indecently assaulted by a man on March 31st, 1984. Another 10-year-old girl, a friend of hers, also complained to her mother that she had been indecently assaulted by the same man. She complained on being questioned by her mother a day later. The parents of both girls were very worried about the incident. They did not know what to do as they wanted the man punished, but did not want to expose their daughters to the ordeal of having to give evidence in court. This is understandable. The trauma of being cross-examined can sometimes be more psychologically damaging than having been touched indecently. They sought advice. They are service personnel. A naval officer came into the picture, then a welfare worker and another naval officer. The matter went up and down the ladder of command. The advice was to report the matter to the police.

3 The police, in the form of the head of the C.I.D. and a woman police officer, went to see the girls and their parents. In the presence of a welfare worker, statements were taken from the two girls and their parents. A statement was also taken from another girl who was able to give relevant evidence but who had not been involved in the alleged indecent assaults.

4 It must have been obvious from the very beginning, not only to the parents but also to the naval officers and the police that, without the oral evidence of the two girls, the case against this man was a non-starter. It must also have been obvious to both the police and the naval officers that the parents did not want their daughters to give evidence. The parents and the other girl were willing, and I dare say anxious, to give evidence to see an alleged offender being dealt with by the court.

5 The case was allowed to proceed and the man was charged. The authorities, police and naval, were hoping he would plead guilty because of a statement he was supposed to have made. The man appeared before the magistrates' court on April 19th, 1984 and pleaded not guilty to both charges. Bail was granted and the case was adjourned to May 18th, 1984. The moral to bear in mind is, never proceed with a case in the expectation of a plea of guilty, always be ready to prove a case entirely.

6 Before May 18th, 1984, there were conferences between the Naval Provost Marshal and the Commissioner of Police, the Naval Provost Marshal and the head of the C.I.D. and between the head of the C.I.D. and Crown Counsel, culminating in the head of the C.I.D. going to see the parents. Statements in writing were taken from the parents saying that they did not wish the case to proceed.

7 May 18th, 1984 arrived, and Crown Counsel was in court to proceed with the case. Neither the parents, however, nor their daughters, nor the other girl, were in attendance. When the case was called, Crown Counsel requested that the Stipendiary Magistrate issue the six witness summonses (with which we are here concerned) on the ground that the witnesses could give relevant evidence but did not want to come to court voluntarily. To prove lack of voluntariness, he requested that the court officer call their names. Their names were called, but there was no answer.

8 There was a good reason, however, why they did not appear. No one had told them they had to come. On the intervenor's side there is no clear evidence that they were so advised. On the applicants' side there is positive evidence that they were not so advised.

9 I gave my decision at the conclusion of the submissions of counsel. This is what I said:

> "The issue of whether a witness summons should be set aside is a matter of some urgency as normally there is a case pending to be heard in the lower court. I am therefore giving my decision now, but on a very narrow ground."

10 There is nothing in this application which leads me to the conclusion that the Stipendiary Magistrate acted wrongly in the exercise of his powers in issuing the witness summonses complained of on the facts before him. What is not clear is whether, if ever, all the witnesses refused

to give evidence voluntarily. There is no doubt that the parents of the two children involved did not want the case to proceed if their children had to give *viva voce* evidence. A very natural reaction of any parent. I can also understand why, nonetheless, the law officers of the Crown wanted to proceed with the case.

11 Before the magistrates' court, the witness summonses were obtained, partly, if not mainly, on the strength that the several witnesses did not appear in court on May 18th, 1984, when the case was to resume. But the undisputed fact is that no one told the witnesses that they were required to attend court that day.

12 In seeking witness summonses, counsel for the court honestly, but unwittingly, supplied the Stipendiary Magistrate with the wrong information; that the several witness had failed to attend voluntarily on the date of the hearing. Such could never have been the case in respect of all witnesses. It might, however, have been so in respect of the two children.

13 The Stipendiary Magistrate satisfied himself on the wrong information, and therefore his decision was taken on the wrong basis. It cannot stand. I will set aside all the witness summonses. In due course I hope to give a written judgment in which I will try to deal with some of the submissions that have been made.

14 The power of the magistrates' court to issue a witness summons and compel a witness to give evidence is contained in s.28(1) of the Magistrates' Court Ordinance (*cap.* 95). It reads:

> "Where a justice of the peace is satisfied that any person in Gibraltar is likely to be able to give material evidence, or produce any document or thing likely to be material evidence, at an enquiry into an indictable offence by the magistrates' court or at the summary trial of an information or hearing of a complaint by the court and that that person will not voluntarily attend as a witness or will not voluntarily produce the document or thing, the justice shall issue a summons directed to that person requiring him to attend before the court at the time and place appointed in the summons to give evidence or to produce the document or thing."

15 Before the magistrates' court can issue a witness summons, it must satisfy itself that the witness can give material evidence but is not willing to attend voluntarily. Counsel for the applicants has argued that in this case, the magistrate could not have satisfied himself as there was no due inquiry. He goes on to the extent of submitting that there should have been evidence on oath (some sort of trial within a trial). I agree that the Stipendiary had to act judicially and not capriciously, however, it is entirely up to him how he satisfies himself. He can request evidence on oath, or he can accept counsel's word. It is at his discretion as to how to

proceed, provided that he is satisfied. In this case he satisfied himself on the information provided by Crown Counsel on the question of the witnesses not attending voluntarily. On the question of materiality, the case spoke for itself. The witnesses to be summonsed included the two victims. The fact that a witness summons is requested by counsel need not deter the court from requiring evidence on oath, if necessary.

16 The power of this court to review the issue of a witness summons is not in dispute. *R.* v. *Lewis JJ., ex p. Gaming Bd. for G.B.* (2) is authority for the proposition that a witness summons issued by the magistrates' court can be set aside by order of certiorari if there has been an abuse of the process of the court or the witness cannot give relevant evidence. Apart from this authority, I am of the view, but without deciding it, that the Supreme Court has an inherent power to set aside a witness summons on an application to a judge in chambers supported by affidavit without the need to apply for judicial review. The latter is a better method of deciding the matter promptly and not delaying the hearing in the lower court.

17 Another submission made by counsel for the applicants was that the magistrates' court has discretion to refuse to issue a witness summons against a child, if it might result in psychological harm to the child. Rarely would this factor be present in the first instance. I think that the proper course is to concentrate on the question of materiality and lack of voluntariness and leave the other factors, if any, to a superior court.

18 Finally, counsel for the interveners has drawn my attention to *R.* v. *Greenwich JJ., ex p. Carter* (1). The following is the note of the case in the *Criminal Law Review* ([1973] Crim. L.R. at 444–445):

> "Following the death of the applicant's daughter after being knocked down by a motor car, summonses alleging causing death by dangerous driving and driving at a dangerous speed and in a dangerous manner were issued against the driver. Two witnesses of the accident aged 15 and 12 years respectively were refused permission by their fathers to attend the hearing of the summonses, to give evidence. An application was made to a Metropolitan Stipendiary Magistrate under section 77 of the Magistrates' Courts Act 1952 for the issue of witness summonses against the two witnesses to compel their attendance, but the application was refused on the ground *inter alia*, that it would not be proper to issue summonses against persons under the age of 17 years as since persons under that age could not be imprisoned, there was thus no power to enforce the penalties provided by the Act of 1952 against failure to comply with a witness summons issued under section 77.
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> *Held*, allowing the application, that the witnesses being under the age of 17 years could not be imprisoned if they failed to comply with a witness summons, but it was quite wrong that the magistrate should

say that the witness summonses should not issue because there might be difficulty in enforcing them if the person summoned did not come voluntarily to court; that the magistrate had directed his mind into the future and that it was wrong to refuse to issue the witness summonses because there might be some difficulty in the future."

19 After hearing counsel on the question of costs, I give the costs to applicants to be paid by the intervenors.

Application granted.

[1980–87 Gib LR 250]

MIGGE v. DELLIPIANI and TRIAY AND TRIAY

COURT OF APPEAL (Spry, P., Blair-Kerr and Brett, JJ.A.): October 26th, 1984

Legal Profession–duties to client—conveyancing—solicitor acting for purchaser of land to draft conveyance which gives client most unencumbered and indefeasible title possible; ensure client obtains most favourable terms possible and understands acquired rights, obligations and available courses of action when disputes arise with vendor

Legal Profession—professional negligence—conveyancing—negligent for solicitor to choose wrong precedent for purchase of freehold of flat if fails to give client most unencumbered and indefeasible title possible, especially since sale of freehold of flat unusual in Gibraltar

Tort—deceit—elements of tort—false representation made knowingly, without belief in its truth, recklessly not caring whether true or false, intending representee to rely on it—no false representation if vendor's agent allows purchaser to believe he is vendor, if nothing turns directly on identity of vendor

M brought proceedings in the Supreme Court against D for fraud and against his solicitors for negligence.

B and P agreed to purchase a building which contained two maisonettes and two flats. They arranged for D to act as their agent in negotiations. When a sale seemed near, D instructed an estate agent to find a purchaser for the flats. The estate agent introduced M, who agreed to purchase the freehold of one of the flats and advanced the balance of the purchase