PINCHO v. ATTORNEY-GENERAL

SUPREME COURT (Pizzarello, A.J.): September 12th, 1997

Criminal Procedure—witness statements—disclosure to court—magistrate not to see prosecution witness statements before trial without defence agreement—justice to be seen to be done

The appellant was charged in the magistrates' court with assaulting a police officer and obstructing him in the execution of his duty.

The Stipendiary Magistrate was provided in advance of the trial with the written witness statements of the police officers involved, containing, *inter alia*, evidence of the conversation alleged to have taken place between the appellant and the arresting officer. During the hearing of oral evidence from those witnesses, he highlighted those parts of the witness statements which were repeated in court and made additional notes of evidence given for the first time. The appellant was convicted on both charges.

On appeal, he submitted that the Crown's furnishing the Stipendiary Magistrate with prosecution statements which might not be tendered in evidence and which contained inadmissible hearsay went against the principle that justice should be seen to be done, since his perception of the facts could have been tainted by evidence of which he should have remained unaware.

The Crown submitted in reply that (a) as a legally qualified person, the Stipendiary Magistrate was quite capable of distinguishing between admissible and inadmissible evidence (as he was required to do in the course of many contested trials) and of ignoring evidence which did not form part of the prosecution case against the appellant; and (b) since the verdict of the court had been consistent with the evidence adduced and the appellant had offered no evidence, there had been no material irregularity.

Held, allowing the appeal:

The interests of justice required that a magistrate should not receive evidence from either side prior to a criminal trial without the expressed consent of the other, since it was important not only that justice be done but that it also be seen to be done. As the arbiter of law in the magistrates' court, a magistrate would be called upon to decide upon the admissibility of evidence and thereafter to disregard certain evidence only at the request of the parties and in the course of an ongoing trial, not beforehand. Furthermore, since the Crown conceded that it would be improper for Justices of the Peace, who were not legally qualified, to do

as the Stipendiary Magistrate had done and since the Stipendiary Magistrate was by statute in no different a position to a Justice of the Peace in respect of receiving evidence, there had been a material irregularity and the appellant's convictions would be quashed (page 153, line 35 – page 154, line 25; page 155, lines 21–25).

Case cited:

(1) *Wahba* v. *Att.-Gen.*, Supreme Ct., September 13th, 1997, unreported, considered.

C. Finch for the appellant;
J.M.P. Nuñez for the Crown.

PIZZARELLO, A.J.: In this case the appellant was charged with two offences: (a) assault on a police officer contrary to s.89 of the Criminal Offences Ordinance; and (b) obstructing a police officer in the execution of his duty, contrary to the provisions of the same section.

The facts are as follows: On March 21st, 1995 at 6.45 a.m., Special Constables Watson and Nuñez were on board the M.V. *Arctic* when they received a report regarding a boat approaching Gibraltar waters. They proceeded to the area of Elbow Battery. They saw a vessel approaching without navigation lights and they gave chase. It was beginning to dawn just before sunrise and Special Const. Watson noted that the vessel was a phantom. Special Const. Nuñez put on the sirens and the beacons but the phantom did not stop and they chased it into the marina, where the phantom squeezed in between two boats already berthed there. Jobert Pincho, the appellant, was on the pontoon. There were two men in the phantom wearing flotation suits and they left the phantom, without tying up the boat, and ran off. They were helped off the phantom by the appellant who then went on board. Once Pincho was on board, Special Const. Watson manoeuvred the vessel *Arctic* so as to enable Nuñez to get on board the phantom. Special Const. Nuñez went on board the phantom and spoke to Pincho (it is to be noted that Pincho gave no evidence). The conversation is described in the record as follows:

> "I went on to the boat and asked Pincho if the boat belonged to him and Pincho said No, that the boat had been stolen. I asked him why, if he knew the boat had been stolen, had he helped the two others to run away. I told him, as the boat had nothing to do with him, to get off. Pincho said: 'Tu quien coño eres?' I made to take the ignition keys and he pushed me in the chest causing me to stumble. I told Pincho I was arresting him for obstructing and assaulting me."

In cross-examination, Special Const. Nuñez said that Pincho stated the boat was not his. This account by Nuñez is corroborated by Special Const. Watson as follows:

"Pincho got on board the vessel. I manoeuvred close so that PC Nuñez could get onto the boat. Nuñez told him to get off, and Pincho refused. Nuñez then made to get the ignition keys. Pincho said: 'Quien coño eres?' (Who the hell do you think you are?) and pushed Nuñez in the chest."

In so far as there is any difference, I observe that Special Const. Watson was on board the police vessel and what Nuñez says seems to be the more correct. Pincho is more likely to have used the expression as a reply to the order to leave the boat rather than as a reaction to the attempt by Nuñez to take the keys. The reaction to that being the push, as Nuñez described. Pincho was taken away and the phantom was searched.

These were the observable facts. What was in the policemen's minds is fact as well. Their intention was to check the boat out and at no stage did they get beside the phantom with their vessel. Both officers said so and that is clear. In addition, Nuñez said that upon seeing the boat without lights and two men running away, "my thought was that they were engaged in an illicit activity."

Now, it seems to me that before the police can stop a vessel a policeman must have reasonable grounds to believe that an offence has been committed. There are two elements which make this up. The first is the subjective state of the policeman's mind and the second, the objective circumstances which can support the state of mind. The only offence which, on the evidence, the policemen had observed to justify stopping the phantom in the first instance was that it was not showing lights. Mr. Finch has endeavoured to pursuade me that the absence of lights had nothing to do with their intent to stop and check the vessel. This, he says, is obvious from the fact that the policemen had been instructed to await the vessel (for what purpose other than to stop, search and detain? he asks), that in their statements the two policemen made no mention of the lack of lights and, furthermore, that there was no charge in respect of what should have been, at this stage, the basis on which the policemen could contemplate stopping the vessel, let alone instigating a search. And that is fundamental to this appeal, because if there was no such intent then the chase was not authorized and they were not in the execution of police duties, and that would undermine the subsequent events.

As to the activities that had been observed while the phantom was under surveillance by radar, these were unknown to these two police officers and since they were not told what they were, the police officers seem to me to have had no cause on this ground to stop the vessel or search it. In any case, as counsel has pointed out, whilst the vessel was in the jurisdiction of Gibraltar, nothing was observed by the two police officers, other than the lack of navigation lights, which could have led them to suspect that the occupants had been engaged in any illicit activity. But what illicit activity? The occupants were under the observation of the police all the time. Only the fact that the vessel had no navigation lights

was a valid ground for stopping the phantom to report for process. Naturally if thereafter, as a result of their observations, they had seen something suspicious, then they could have taken further action.

In the circumstances, it seems to me that once they had put on their sirens and beacons and the vessel failed to stop there was cause to take further action, *i.e.* the police officers were right to chase the vessel. Since there exists the possibility that those on board may not have heard the sirens or seen the beacons, they may not have been obstructing but the policemen had the right and duty to follow the phantom. As soon as the phantom went alongside and the occupants left it hurriedly, it is my opinion that the officers were right to board it and the police had the right reasons to do so in their minds. As Special Const. Nuñez explained in answer to the bench, having seen the boat without lights and the two men running away after being followed by the police boat with sirens wailing and beams flashing, they were then entitled to check it out, notwithstanding that Mr. Pincho was on board. In this case it is obvious that Mr. Pincho had no business on board that vessel which might override the policemen's right to board and search it.

During the search it was seen that the registration number was not visible and a number of items including two blue holdalls, night visions, balaclavas and life jackets were found. None of this entitled the police to seize the boat but when the search was carried out the police were on board in execution of their duty and the vessel had been properly detained, and it does not seem to me that, as Mr. Finch submits, the vessel was not abandoned and had on board somebody (Mr. Pincho) who could look after it and from whom the police should have sought permission if they wanted to be legitimately and lawfully on board. As I have said, Mr. Pincho had no business to be on the vessel. It was not his and had been stolen and he should have left it when ordered to do so by the policeman. The submission that Mr. Finch is recorded as having made to the Stipendiary Magistrate, that the officers had no right to seize the property, may well be right, but at the time that Pincho is alleged to have committed the offence, the police were, in my view, legitimately on board.

Mr. Finch, at the hearing of this appeal, added a further ground of appeal which was not objected to by Mr. Nuñez for the Crown and he made this the more substantial part of the appeal. It relates to the fact that the Stipendiary Magistrate appears to have had a docket of the police evidence available for his perusal before the trial and this without the consent of the defendant's counsel. Mr. Finch submitted that that follows the present practice of the Stipendiary Magistrate which is a practice which was not, to his knowledge, the practice of previous Stipendiary Magistrates or the practice of the Justices of the Peace. That practice is wrong and should not be allowed. In the first place, it does not appear that justice is done. It offends the principle that justice must not only be done

but must also be seen to be done. The defendant is not aware of what has been supplied to the Stipendiary Magistrate. Secondly, it is wrong because what was given to the Stipendiary Magistrate is hearsay evidence, which is not admissible. That evidence should be given *viva voce* by the witness unless both counsel agree that the Stipendiary should have it.

Mr. Finch elaborated his arguments by pointing to the fact that the Stipendiary Magistrate is the arbiter of both law and fact and if, by analogy, one considers trials in the Supreme Court, where a judge does indeed peruse a docket, the judge is the judge of law and the jury, who are the judges of fact, do not see the docket. There are of course instances where the Stipendiary Magistrate may have to rule on admissibility of evidence and for that purpose entertain, as for a *voir dire*, evidence which he may thereafter reject, but this is done during the course of the trial and the defendants and his counsel are aware of it. The Stipendiary Magistrate will have seen what perhaps might never have been put to him when the case was led before him. Mr. Finch submitted that there is danger in that and the danger of it is that it is in written form and as the relevant witness may not be called, it makes it an uphill task for the defence when the perception of the judge of fact is tainted by factors he already knows about and ought not to know. Further, it is bad for unrepresented defendants who cannot know the ins and outs of these technicalities. He submitted that the practice of the Stipendiary is highly questionable and not legal. It does not help the defence cause one bit and it does no good for justice being seen to be done.

In reply on this matter of the Stipendiary Magistrate's practice, Mr. Nuñez accepted that there is a danger, but said that the Stipendiary Magistrate is a qualified lawyer and is well able to compartmentalize and put to one side that which he should not see. As far as the practice is concerned, Mr. Nuñez averred that the Stipendiary Magistrate had never asked him for the docket and what he was in fact given was the witness statements of the case and not the police docket. He submitted that there could be no objection in principle to the practice and, while he had not been able to unearth any authorities on the matter, he understood that it happens in the United Kingdom as well. But, he repeated, the court is dealing with a qualified Stipendiary Magistrate with many years' experience, who has acted as a recorder and can easily differentiate between what is admissible and what is not. Granted that the statements are not admissible—and the Stipendiary Magistrate is used to dealing with this sort of evidence and witness statements in contested cases and deciding whether to allow them or not—but he takes it out of his mind if he rules that a statement ought not to be admitted.

The practice of the Stipendiary Magistrate appears to be that he highlights on the statement that which is given verbally, so, Mr. Nuñez submitted, no great harm is done. It makes it easier for him to follow the

evidence that is given and it saves a lot of time because he need not take the otherwise necessary notes but may instead just confine himself to taking notes of any additional points. In this case there is nothing to suggest that the statements were wrongly relied upon and Mr. Tellez was dismissed. The Stipendiary Magistrate is perfectly able to consider the different matters on the admissible evidence before him. It is a practice which one must use with caution but it is not a practice which is wrong.

This appeal was followed the following day by another appeal, *Wahba* v. *Att.-Gen.* (1), where the same point was raised. Again it was submitted that the Stipendiary Magistrate's was an undesirable practice. Mr. Pilley, who appeared for the appellant, conceded he had no authority in the point. Miss Davidson for the Attorney-General then made the second point. She submitted that if the decision is consistent with the evidence then the Stipendiary Magistrate's practice of reading is irrelevant. In general, the practice assists the Stipendiary Magistrate to help him identify matters of law and what is relevant and he is sufficiently experienced to direct his mind to proper considerations. Miss Davidson, in answer to my asking whether Justices of the Peace can indulge in that practice, agreed that this was not a practice which would be acceptable if followed by the Justices of the Peace.

As I see it, it is not a desirable practice. A magistrate should have no papers supplied to him by either party except under authority of statute or with the express consent of the other side. It seems to me clear that it is not proper for the Justices of the Peace to be so supplied for all the reasons outlined by counsel as I have set them out. Unless statute confers upon the Stipendiary Magistrate extra powers he is in the same position as any lay Justice of the Peace.

It follows, in my view, that there was a material irregularity in the course of the trial and the appeal is allowed.

Appeal allowed.
