Teague v Chin & Teague v Chin & Anor [2013] NTSC 72

PARTIES:	TEAGUE, Alan James v CHIN, Nicholas Michael and TEAGUE, Alan James v CHIN, Nicholas and MORRIS, Elizabeth
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE AND TERRITORY JURISDICTION
FILE NO:	34 of 2013 (21300964) and 75 of 2013 (21300964)
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JUDGMENT OF:	KELLY J
APPEAL FROM:	E MORRIS SM

CATCHWORDS:

COURTS AND TRIBUNALS—Practice and procedure—Court of Summary Jurisdiction —Adjournment—Magistrate did not give reasons for refusing to

grant adjournment—Failure to accord natural justice—Order in the nature of certiorari granted.

JUDICIAL REVIEW—Court of Summary Jurisdiction—Adjournment—Magistrate did not give reasons for refusing to grant adjournment—Failure to accord natural justice—Order in the nature of certiorari granted.

Lustead v Menichelli [2010] 19 Tas R 455; *Police v Vuckic* [2010] SASC 271; *DPP v Ozakca* (2006) 68 NSWLR 325, considered

Public Service Board v Osmond (1986) 159 CLR 656; *Kioa v West* (1985) 159 CLR 550; *Sali v SPC Ltd* (1993) 116 ALR 625, followed

REPRESENTATION:

Counsel:

Appellant:	D Morters
Respondent:	M Thomas

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Louise Bennett Criminal Lawyer

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Teague v Chin & Teague v Chin & Anor [2013] NTSC 72
Nos 34 of 2013 (21300964) and 75 of 2013 (21300964)

BETWEEN:

ALAN JAMES TEAGUE
Appellant

AND:

NICHOLAS MICHAEL CHIN
Respondent

AND BETWEEN:

ALAN JAMES TEAGUE
Plaintiff

AND:

NICHOLAS MICHAEL CHIN
First Defendant

AND:

ELIZABETH MORRIS SM
Second Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 8 November 2013)

[1] The two matters which have been joined in this proceeding both arise from the same factual background and procedural history. The appellant/plaintiff

(who will be referred to as the appellant) in both cases seeks relief against decisions of the Court of Summary Jurisdiction.

The factual background

[2] On 7 January 2013 the respondent, Mr Nicholas Chin, was stopped by police on Dripstone Road, Nakara. A member of the public had phoned 000 to complain about Mr Chin's alleged dangerous driving.

[3] Mr Chin was required to give a roadside breath test, which returned a negative result for alcohol. The police officers also conducted a saliva swab, which returned a presumptive positive result for amphetamine.

[4] Police arrested Mr Chin and took him to the Royal Darwin Hospital, where a blood sample was taken. Mr Chin was later charged, on 30 January 2013, with four offences under the *Traffic Act* and the *Traffic Regulations*:

(a) driving a motor vehicle with a prohibited drug in his blood, contrary to s 28 of the *Traffic Act*;

(b) driving a motor vehicle whilst under the influence of a drug contrary to s 29AAA(1)(a) of the *Traffic Act;*

(c) driving a motor vehicle in a manner dangerous contrary to s 30(1) of the *Traffic Act*; and

(d) driving a motor vehicle without due care contrary to Regulation 18 of the *Traffic Regulations*.

Proceedings in the Court of Summary Jurisdiction

[5] At some time early in proceedings, the police submitted an arrest file to Prosecutions with an annotation asking for a "lengthy adjournment" should Mr Chin plead not guilty, due to a known backlog in the processing of forensic material. This backlog was said to be in excess of four months at that time.

[6] The forensic material in question was an analysis of Mr Chin's blood sample. Because the Northern Territory lacks any facility at which such an analysis can be performed, the sample had to be sent to Western Australia for processing.

[7] On 7 May 2013 a contest mention took place in the Court of Summary Jurisdiction. Counsel for Mr Chin appeared and indicated that the charges were to be contested. The police officer who appeared at this mention (representing Prosecutions) mistakenly advised the court that the matter was ready to proceed and it was listed for hearing on 11 June 2013. In fact crucial evidence, namely the analysis of Mr Chin's blood sample, had not yet been received.

[8] On 5 June 2013 the Summary Prosecutions department of the Office of the Director of Public Prosecutions received notification that the laboratory in Western Australia had not yet been able to return a forensic result on the blood sample.

[9] Upon receiving this notification Prosecutions applied to the Court of Summary Jurisdiction for the matter to be listed so that an application to adjourn the hearing could be made. That application was listed for the following day, 6 June 2013.

The first application for adjournment

[10] The application on 6 June came before his Honour Mr Neill SM. The prosecutor who appeared advised the court that "the blood work" results were not yet available, that a request to have them expedited had been made, and that a "tentative" timeframe for delivery of the results would be one week. He said that once the results had been received, an expert would need to be briefed to provide analysis, which would take an additional week. He therefore applied for an adjournment of two weeks. Counsel for Mr Chin opposed the application.

[11] During the hearing his Honour questioned the prosecutor and the following exchange occurred:

> MR HUMPHRIS: Your Honour, I can advise this, that there was an issue with regards to payment and authorisation of the blood work.
>
> HIS HONOUR: So you're suggesting that the defendant might have his day in court delayed because of some bureaucratic anomaly?
>
> MR HUMPHRIS: That may be the case, your Honour. But I would make this submission; that the blood work is relevant, it may in fact exonerate the defendant, I can't say, we don't know the results, your Honour. Be trite to say that given the charge, driving with drug in blood, those blood results are in fact crucial.

> HIS HONOUR: I would have thought that to bring such a charge against the defendant you should have – one would presume that the prosecution is armed with knowledge of something along the lines of what he has in his blood."

[12] The prosecutor made a submission that it was in the public interest to pursue the matter and hence for the adjournment to be granted. His Honour rejected that submission saying:

> HIS HONOUR: There's a public interest in pursuing people who there's a proper basis for believing may have committed an offence. The application today is that a hearing date be adjourned on the basis that the core evidence relevant to whether any offence has been committed in count 1 does not yet exist, is that correct?
>
> MR HUMPHRIS: Yes, your Honour."

[13] In fact police had conducted a saliva swab, which returned a presumptive positive result for amphetamine, and preliminary results had been obtained from the blood sample on 24 May 2013 which indicated the presence of amphetamine in Mr Chin's blood but not the quantity, both of which provided a proper basis for a belief that the defendant may have committed the offence in question. However, the prosecutor was not aware of either of these and so did not inform the court of their existence. He conceded that he was not in a position to advise the court what steps had been taken on what dates to obtain the necessary evidence.

[14] As a final submission, the prosecution offered to submit to a costs order should the adjournment be granted. His Honour rejected this submission and commented:

> "Yes to the extent that costs are ever a panacea, … they become less so in this jurisdiction where …, if memory serves, the maximum cost which can be awarded is $770 for the first day …"

an amount his Honour described as "almost offensive". The application to adjourn the hearing was refused.

[15] In fact it is possible to award indemnity costs in the Court of Summary Jurisdiction.[1] In dismissing the application to vacate the trial date, his Honour was acting on two wrong assumptions (that there was no proper basis for believing Mr Chin may have committed an offence and that the maximum award of costs was in the order of $770). He therefore took into account erroneous, and hence irrelevant, considerations. However, the true facts were not communicated to his Honour, the prosecutor did not offer to submit to an award of indemnity costs, and there is in any case no challenge in these proceedings to the decision of Mr Neil SM not to vacate the trial date.

The hearing

[16] The matter proceeded to hearing on its allocated date, 11 June 2013. The hearing took place before her Honour Ms Morris SM. At the beginning of the hearing the prosecutor again made an application for the matter to be adjourned for 1 week. The basis for this application was that preliminary results had been obtained from the blood analysis but these results were not

1 *Justices Regulations* r14(2)

yet available in a certificate form for evidentiary purposes. The preliminary analysis indicated the presence of drugs in Mr Chin's blood.

[17] The letter advising of the preliminary blood results was dated 24 May 2013 but for unexplained reasons did not come to the attention of the prosecutor until 7 June 2013. When questioned by her Honour as to the reason an evidentiary certificate had not been prepared in the interim, the prosecutor responded:

> "Your Honour, the only advice I can give you about that is that this is the cost of the drug screening is very expensive, it's somewhere in the vicinity of $3,500. In order to obtain approval for that kind of testing there's, in order for police to approve that funding, there is a process that needs to be engaged and that process was engaged. And I understand the turnaround time for that process was approximately 12 days."

[18] Counsel for Mr Chin opposed the application. He submitted that the matter had already been on foot for five months and that Mr Chin had been "off the road" for that entire period. He submitted that "the defence is entitled to have some sort of certainty here and that this be prosecuted appropriately. There's no evidence whatsoever that that's occurred here. And there's accordingly no basis, whatsoever, for this application for the matter to be adjourned."

[19] Her Honour responded to this submission by saying "Thank you Mr Thomas. Yes, I decline the application to adjourn the hearing."

[20] The prosecutor then sought leave to withdraw the charges against Mr Chin. Counsel for Mr Chin opposed this application. When invited to make submissions on the application, the prosecutor said "Your honour, it's a matter for the court." Her Honour refused leave to withdraw the charges, saying, "It seems this as though [sic] this matter has been set down for hearing. The defendant is entitled to have the matter finally dealt with to conclusion."

[21] Following this, her Honour invited the prosecutor to put the charges to Mr Chin, which she did. Mr Chin entered pleas of not guilty, the prosecution offered no evidence and her Honour dismissed all charges and discharged Mr Chin.

Proceedings in this Court

[22] On 9 July 2013 the Director of Public Prosecutions filed a notice of appeal pursuant to s 171 and 172 of the *Justices Act*. The grounds of appeal were:

(a) that the learned magistrate erred in requiring the arraignment of the respondent in circumstances where the magistrate was aware that evidence vital to the success of the prosecution case was likely to be forthcoming but that the prosecution was not in a position to presently call that evidence; and

(b) that the learned magistrate erred in finding the respondent not guilty and in dismissing the complaint.

[23] On 8 August 2013 the Director of Public Prosecutions filed an originating motion seeking an order in the nature of certiorari quashing the decision of her Honour Ms Morris SM refusing an application for adjournment on 11 June 2013 and remitting the matter back to the Court of Summary Jurisdiction.

[24] The two proceedings were joined by the Registrar on 27 August 2013 and on 18 October 2013 I heard both matters and reserved my decision.

Judicial review proceeding

[25] The jurisdictional error relied upon by the appellant to quash the decision of the learned trial magistrate is a denial of natural justice. Natural justice requires that a judicial officer give reasons for a decision[2] and also that a party be given a reasonable opportunity to present his or her case.[3] The appellant argues that the learned magistrate erred in both of these respects in refusing the application for an adjournment.

[26] The learned magistrate did not give reasons for her decision to refuse the adjournment: she simply said, "I decline the application to adjourn the hearing." In that she was in error. However, that is not the end of the matter. I also need to determine whether her Honour was wrong to refuse the adjournment.

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2 *Public Service Board v Osmond* (1986) 159 CLR 656 per Gibbs CJ at 667; *Baini v R* (2011) 33 VR 252 at 254; *Lustead v Menichelli* [2010] 19 Tas R 455 at 461

3 *Kioa v West* (1985) 159 CLR 550 per Brennan J at 368

[27] A decision by a court to grant or refuse an adjournment is a procedural decision made in the exercise of a discretion vested in that court. It is therefore a decision which is ordinarily best left to the court seized of the proceedings, and one which will not lightly be set aside on appeal, or review. The court considering an application for an adjournment is entitled to take into account the need to avoid disruptions in the court's lists (with consequent inconvenience to the court and prejudice to the interests of other litigants waiting to be heard) and these considerations are within the knowledge of the court making the decision. An appeal court will generally only interfere with a decision to grant or refuse an adjournment if the discretion has not been exercised judicially or where its exercise was based upon the wrong principle or resulted in gross injustice.[4]

[28] In *Sali*, the majority of the High Court expressed the view that "it is only in extraordinary circumstances that the interests of justice would be served in a case such as the present where the practical effect of the refusal is to terminate the proceedings".

[29] Counsel for the appellant relied on that statement of principle and also on *Lustead v Menichelli*, and *Police v Vuckic*[5]. In *Lustead v Menichelli* the defendant was charged with a number of firearms offences. The prosecutor applied for an adjournment because only one of three witnesses was present

[4] *Sali v SPC Ltd* [1993] HCA 47; (1993) 116 ALR 625; (1993) 67 ALJR 841 per Toohey and Gaudron JJ at paras [21] to [23]; *House v. The King* (1936) 55 CLR 499

[5] [2010] SASC 271

in Court. The defendant opposed the adjournment on the ground that he would be prejudiced by the delay in the finalisation of the charges. The magistrate refused the adjournment without giving reasons. On appeal to the Supreme Court of Tasmania, Crawford CJ allowed the appeal, saying that it was a clear case for holding that the discretion had been wrongly exercised. No previous application for an adjournment had been made; there was some (but only minimal) human error in the failure to have the other two witnesses available; and the defence had not given any detail as to how the defendant would be prejudiced by the delay.

[30] *Police v Vuckic* involved a charge on complaint alleging that the defendant had driven a motor vehicle with a blood alcohol in excess of the prescribed limit. On the day of the hearing, the prosecutor applied to adjourn the matter because a forensic witness who was required to present evidence of the calculation of the blood alcohol percentage was not present. By an oversight, he had not been notified that he was required. The magistrate refused the adjournment. On appeal to the Supreme Court of South Australia, the appeal was allowed. In doing so, Duggan J referred to *Sali* and said:

> "There is also the public interest which should have been taken into account in deciding whether to grant an adjournment in the present circumstances. It was alleged that the respondent drove his vehicle at a time when there was a high concentration of alcohol in his blood and that he collided with a parked car while doing so. There is an obvious public interest in pursuing the prosecution if this will not involve prejudice to the respondent at trial."[6]

[6] at [31]

[31] Counsel for the appellant contended that the refusal of the adjournment in this case meant that the Crown was denied a reasonable (indeed any) opportunity to put its case, that there was a public interest in pursuing the matter, and that the denial of the opportunity for the Crown to do so led to a gross injustice. He pointed out that there had not been any previous adjournments, the requested adjournment was for only 1 week, and there had not been undue delay: the hearing date on which the application was made was approximately 5 months after the date of the alleged offence and the time limited for bringing charges under the *Traffic Act* was 6 months. He contended that this matter was on all fours with both *Lustead v Menichelli*, and *Police v Vuckic* and that the same approach should be adopted.

[32] Counsel for the respondent relied heavily on the decision of the Supreme Court of New South Wales in *DPP v Ozakca*[7]. In that case Rothman J said:

> "It cannot be stressed enough that the elements associated with the right of an accused to escape the continuing state of anxiety and insecurity that necessarily accompanies a criminal charge must be paramount in any review by an appellate court of the exercise of the discretion to refuse to adjourn. The accused is entitled to expedited justice. It is only in exceptional circumstances that an appellate court will interfere to require such a right to be overtaken by inconvenience associated with the unavailability of a witness."[8]

[7] (2006) 68 NSWLR 325
[8] at [25]

[33] Nevertheless, in *Ozakca*, the appeal by the prosecution against the refusal of an adjournment because of the unavailability of a witness, and the subsequent dismissal of the charge, was allowed.[9]

[34] Counsel for the respondent contended that the adjournment had been properly refused. He contended that a delay of 5 months was considerable. He pointed to the fact that the application for an adjournment was made at the last minute and that costs would not have been an adequate remedy in particular because of the miserly nature of the applicable scale. He contended that the charges were at the lowest end of the range of seriousness. Also he said that the defendant would have been prejudiced by any further delay both as a result of the anxiety he suffered while the charges remained undealt with and as a result of the fact that he was "off the road" in the mean time, his licence having been cancelled while the charges were pending.

[35] In reply, counsel for the appellant contended that costs could have been awarded on an indemnity basis for the appearance on the morning the trial was due to take place and that there could have been an order restoring the respondent's licence until the adjourned hearing date. However, these matters were not put to her Honour.

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[9] The circumstances were that the unavailable witness was the victim and the unavailability was caused by circumstances beyond her control, the prosecutor had notified the accused of the proposed application beforehand, the accused was not in custody and did not oppose the adjournment.

[36] I found this case to be a difficult one. Many of the issues argued on the appeal were not put to the learned magistrate. I am mindful of the fact that this Court should be slow to interfere with a discretionary decision by a magistrate on a matter of procedure, whether the matter comes before this court by way of appeal or on an application for judicial review. However, it is not possible to discern the basis upon which her Honour refused the adjournment because of the absence of reasons and that in itself constitutes a reviewable error.

[37] While I agree that, as Rothman J said in *Ozakca*, the right of an accused to escape the continuing state of anxiety and insecurity that necessarily accompanies a criminal charge is an important consideration, it is not the only one. I also need to consider the public interest in allowing charges to be prosecuted

[38] On the whole I am of the opinion that the adjournment should have been allowed.

(a) The matter had not been adjourned before.

(b) The prosecutor sought an adjournment of only 1 week which was not excessive.

(c) Five months had elapsed since the date of the alleged offences, but that was not excessive in the circumstances, given that the legislation provides that charges may be laid within 6 months.

(d) The court was informed of the existence of preliminary results from the blood analysis indicating that amphetamine was present in Mr Chin's blood.

(e) The refusal of the adjournment, coupled with the refusal of leave to withdraw the charges so they could be laid again, made it inevitable that the charges would be dismissed without the Crown having the opportunity to present its case.

(f) The charges came before the court on complaint and could not be categorised as very serious offences, but there was nevertheless a public interest in allowing them to be prosecuted. One of the charges was dangerous driving and the alleged actions of the appellant were serious enough that they were reported by a member of the public calling 000.

[39] There will be an order in the nature of certiorari quashing the decision of the learned magistrate refusing the application for an adjournment. The decision to dismiss the charges is set aside. The charges are remitted to the Court of Summary Jurisdiction to be heard and determined according to law.

The Appeal

[40] The stated grounds of appeal are:

(a) that the learned magistrate erred in requiring the arraignment of the respondent in circumstances where the magistrate was aware that

evidence vital to the success of the prosecution case was likely to be forthcoming but that the prosecution was not in a position to presently call that evidence; and

(b) that the learned magistrate erred in finding the respondent not guilty and in dismissing the complaint.

[41] Dealing first with ground (b), it seems to me that the learned magistrate's error lay in refusing the adjournment, not in what followed. Once her Honour determined that the charges must be heard and determined that day, when the prosecutor presented no evidence, her Honour was not in error in dismissing the charges. Indeed she was bound to do so.

[42] Ground (a) is really a re-statement of the appellant's case on the judicial review proceeding. The essential complaint in both is that the prosecutor was required to proceed with the hearing without evidence crucial to the case. On one view of the matter, this ground cannot succeed as the decision being impugned is a not a final decision. On another view of the matter, the combined effect of grounds (a) and (b) is to appeal against the final decision to dismiss the charges on the ground of the earlier error. It is not necessary for me to determine which is the correct analysis. As a remedy has been provided in the judicial review proceedings, it seems to me that the appeal is unnecessary and should be dismissed.
