Markos v Quin Investments Pty Ltd & Kuzub **[2009] SAIRC 77**

MAGISTRATES COURT OF SOUTH AUSTRALIA
(INDUSTRIAL OFFENCES JURISDICTION)

MARKOS, Ian

v

QUIN INVESTMENTS PTY LTD

and

KUZUB, Nikolai

JURISDICTION: Application for directions

FILE NO/S: 2475 of 2008

HEARING DATES: 19 November 2009

JUDGMENT OF: Industrial Magistrate M Ardlie

DELIVERED ON: 20 November 2009

CATCHWORDS:

Application for Directions – Stay of proceedings – Abuse of process - ***Held****: the power to stay proceedings is a remedy of an exceptional nature – A trial is not unfair simply because evidence that may be relevant is no longer accessible – Application dismissed – S 19(1), 61(3) Occupational Health Safety and Welfare Act 1986, Summary Procedure Act 1921, Summary Procedure (Industrial Offences) Regulations.*

Wunsch v SA Police (1965) 64 SASR 203
Police v Gray (2003) 85 SASR 1
Police v Turbitt (2005) 92 SASR 480
Police v Sherlock (2009) 103 SASR 147
Police v Pakrou (2008) 103 SASR 124
R v Edwards [2009] HCA 20
AI Automotive v Moore [2007] SAIRC 58
Diemould Tooling Services Pty Ltd v Oaten; Santos Ltd v Markos (2008) 101 SASR 339
Softwood Holdings Limited v Stevenson (1996) 188 LSJS 482
CSR Limited v Stevenson (1995) 184 LSJS 204
Fielders Steel Roofing Pty Ltd v Moore [2004] SAIRC 62

Penney v R (1998) 155 ALR 605
Sedmak v Police [2008] SASC 307

REPRESENTATION:

Counsel:
Complainant: Ms L Chapman with Mr K Lesses
Defendant: Mr J Telfer with Mr G Germein
Solicitors:
Complainant: Crown Solicitor's Office
Defendant: Duddy Shopov

Introduction

1 The first defendant is charged with a breach of s 19(1) of the *Occupational Health, Safety and Welfare Act 1986* ("the Act"). The incident, the subject matter of the complaint and summons, occurred on 9 May 2006 at Gladstone. The first defendant operated an explosives manufacturing facility.

2 On 9 May 2006 various employees were performing work duties in relation to the manufacture of a packaged explosive in and around the factory at the facility known as Factory No 1. An explosion occurred and three employees were killed as a result and two other employees were injured.

3 The second defendant Nikolai Kuzub ("Kuzub") has been charged with an offence pursuant to the provisions of s 61(3) of the Act. It is alleged that the second defendant failed to take reasonable steps to ensure compliance by the first defendant with its obligations under s 19(1) of the Act.

4 The complaint and summons first came before the Court on 11 June 2008. The following sequence of events then occurred:

- On 11 June 2008 the complaint and summons was adjourned by consent to the 15 October 2008;
- On 15 October 2008 the matter was further adjourned in order for the defendant to obtain an independent experts report, the adjourned date being 4 February 2009;
- On 4 February 2009 the matter was adjourned for a pre-trial conference to take place on 16 March 2009;
- On 16 March 2009 the matter was further adjourned to 18 May 2009;
- On 18 May 2009 the matter was listed for hearing commencing on 23 November 2009 until 23 December 2009, both parties given liberty to apply;
- On 11 November 2009 at the request of the complainant the matter was called on to coordinate court requirements and the parties requirements for the duration of the trial, the matter being listed in court as in chambers on Monday 16 November 2009;

- The defendants by application dated 12 November 2009 sought a permanent stay. Two supporting affidavits of Nikolai Kuzub, the second defendant, both sworn on 12 November 2009 were lodged with the application;

- On 16 November 2009 leave was granted to the complainant to amend the complaint and summons by a substituted complaint and summons with argument in relation to the stay application being listed for hearing on Thursday 19 November 2009.

The application and two supporting affidavits seeking a permanent stay

5 In the first affidavit Kuzub details his extensive qualifications research and experience in relation to explosives.

6 He states that he was present at the site of the explosion immediately following the occurrence attempting to minimise any dangers in the aftermath and to locate and assist injured workmen. He goes on to say that he was ordered from the site at the direction of SafeWork SA ("SafeWork") and indicates his belief that SafeWork resolved to take immediate control of the site on 9 May 2006. On 10 May 2006 he says his keys were taken from him by Simon Ridge of SafeWork. Thereafter he was locked out and denied re-entry to or access to the site and was first permitted to enter the site in August 2007 when a Prohibition Notice was lifted and permission was granted to enter the site.

7 He states that evidence vital to the establishment of the cause of the explosion was contained within the site and that he was unfairly precluded from viewing, sampling, examining or explaining any of the evidence.

8 During the period of his exclusion from the site he indicates that SafeWork declined to communicate with him notwithstanding the fact that he had qualifications, experience and knowledge of the setup and operation of the factory. SafeWork did not interview him until March 2008 after its investigations were complete. SafeWork declined all independent offers of assistance and conducted its enquiry in secrecy.

9 He says that at an early time in the investigation he requested that he be permitted to call in experts at his own expense to examine the evidence in order to determine the cause of the explosion. This request was denied.

10 He maintained that the investigation by SafeWork and consequent prosecution was unfairly focussed in one area to the exclusion of any

proper investigation of other possible causes and as a result the defendant's have been denied natural justice and procedural fairness.

11 His view is that evidence that he sought to obtain is now lost by effluxion of time, deterioration by exposure to the elements, and disturbance by SafeWork.

12 In his second affidavit he states that SafeWork has not produced any report from an Inspector or expert with chemical expertise in energetic materials. Moreover whilst it had control of the site SafeWork did not engage the services of any independent person with expertise in energetic materials. SafeWork refused to allow any person who had independent chemical expertise in energetic materials to come on site. SafeWork refused all offers of assistance from experts skilled in the examination of explosion sites, such offers of assistance included:

- Paul Harrison, a world authority in explosion investigation who presented himself at the site on 10 May 2006 offering his assistance. He was not allowed on site and sent away at the direction of SafeWork;

- Dyno Asian Pacific offered to provide expert explosive personnel to assist SafeWork in the investigation and this offer was rejected;

- Union Explosive Espaniola offered to bring a team of experts from Madrid including Jose Mario Ruitz, who as a world expert originally installed the plant and circuitry at Gladstone and oversaw commissioning of the plant and training of operatives. This offer was refused;

- The Queensland Government through the Specialist Explosives Inspectorate of the Department of Mines offered assistance to the South Australian Department of Premier and Cabinet – this offer was not accepted;

- On 12 July 2006 the Australian Explosives Industry and Safety Group Inc an association covering the major global explosives companies wrote to the Premier of South Australia offering to introduce SafeWork to globally recognised experts in the industry – this offer was acknowledged but not followed up.

13 He complains that SafeWork, by failing to carry out appropriate assays of residues and preventing any person or authority from having access to the evidence before that evidence was destroyed by effluxion of time

deterioration by exposure to the elements or disturbance by SafeWork officers, has made it impossible for the defendants to receive a fair trial.

Jurisdiction to hear the application seeking a permanent stay

14 The *Summary Procedure Act 1921 (SA)* ("SPA") states that "a charge of an industrial offence must be set down for hearing by an Industrial Magistrate". The same Act indicates that an Industrial Magistrate means a Magistrate assigned by the Governor to be an Industrial Magistrate and industrial offence means a summary offence declared by regulation under the Act to be an industrial offence. The *Summary Procedure (Industrial Offences) Regulations* state that a summary offence against certain Acts is declared to be an industrial offence for the purposes of the SPA and amongst other pieces of legislation refers to the *Occupational Health, Safety and Welfare Act 1986*. The end result is that I am an Industrial Magistrate dealing with an industrial offence in the Magistrates Court.

15 The Magistrates Court is a court of record[1]. The Magistrates Court does have powers to grant a permanent stay to prevent an abuse of process which will result in an unfair trial[2].

Summary of submissions by the defendant

16 **Mr Telfer** of counsel indicated that the application is relatively discrete. The nub of it is getting to the bottom of what caused the explosion. From the information received it seems to be that the ribbon blender is held to be the culprit. The storage of materials and documents play no part in the events leading up to the explosion or indeed what happened afterwards. To that extent therefore it would seem that the charges in relation to those particulars could and should proceed.

17 Essentially if the Court is prepared to exercise its discretion it should rule that the prosecution should not lead evidence in relation to the ribbon blender, the ribbon blender being the cause of the explosion.

18 Reference was made to a recent decision of the Full Court of South Australia[3], to a decision of Kourakis J[4] and also to a decision of the High Court handed down on 21 May 2009[5].

---

[1] Section 5 Magistrates Court Act 1991 (SA).
[2] *Wunsch v SA Police* (1995) 64 SASR 203*; Police v Gray* (2003) 85 SASR 1*; Police v Turbitt* (2005) 92 SASR 480.
[3] *Police v Sherlock* (2009) 103 SASR 147 at paras [50, 62, 65 - 75 inclusive]
[4] *Police v Pakrou* (2008) 103 SASR 124 at paras [59 - 78 inclusive]
[5] *R v Edwards* [2009] HCA 20

19 The basis of the application was said to be akin to those matters where evidence had been lost or destroyed to the detriment of an accused persons defence where Courts have allowed a stay.

20 The affidavits of Kuzub refer to the site being taken over by SafeWork and Kuzub being denied access. As a result of not being allowed access to the site for approximately two years the defendants were not able to obtain a report from an expert on behalf of the defendants to say what the cause of the explosion was.

21 The defendants dispute the fact that the ribbon blender could be the cause of the explosion and that an expert has been retained to give evidence to that effect based on his observations and findings in the matter. The defendants are charged with failing to ensure so far as was reasonably practicable the safety of workers at the site and the only way the defendants can reasonably defend the charge is to point to evidence to say not only is it not the ribbon blender but that it is not due to other circumstances.

22 The complainant cannot prevent, in the absence of some assertion that evidence will be destroyed, altered, changed or tampered with, the defendant from having experts have a look at the scene in a time immediately following the explosion to enable an expert to ascertain what is the cause.

23 The defendants have to be in a position to be able to obtain as much evidence as possible. Reference was made to comments made by His Honour Judge Gilchrist in *AI Automotive Pty Ltd v Moore*[6]. His Honour said:

> "I agree with Dr Bleby that the Crown did not have to identify every imaginable cause of the fall and disprove it. Whilst the legal burden of proof was with and remained upon the Crown throughout, if in a case such as this a defendant wishes to argue that there may have been something untoward that caused the fall, over which it had no control, it needs to point to some existing evidence or introduce some evidence itself that raises that possibility. It did no such thing."

24 After the explosion the evidence was all there. The evidence was in situ and Kuzub had people he knew possessing expertise that he wanted to have a look at the evidence on site to ascertain if possible the cause of the explosion. The defendants in order to raise doubt are entitled to establish that it was not the ribbon blender. If the Court is not prepared to accept the defendants' expert on that, then the defendants can say that there is another cause which can be introduced. The situation is that the

[6] [2007] SAIRC 58 at para 41.

evidence of another cause is now not able to be assessed and commented upon by the defendants.

25 A defendant is entitled to have a report prepared for the purposes of cross-examining the expert called by the complainant. Here the actions of the investigators have had the effect of precluding experts nominated by the defendants from being able to attend, inspect and make reports.

26 The situation that exists falls within the exceptional circumstances referred to in the decisions in this area.

27 The application to stay is made out. It should be on the basis that the Court does not allow evidence about the ribbon blender to be lead, which then is effectively a stay on that part of the complaint and summons which relates to the ribbon blender.

28 **Mr Germein** of counsel for the defendants also made submissions. His initial complaint was that SafeWork had excluded Kuzub from the site. This exclusion was hard to follow because not only was Kuzub an expert in the field but he was intimately familiar with the plant which has been in operation for 20 years. Following the explosion time was of the essence because the evidence to be found of causation of the explosion was within the residues on site. SafeWork denied access to experts who were prepared to offer their assistance.

29 The defendants' position is that it was a chemical explosion. A proper examination of the chemical elements may have been carried out but anyone else was prevented from doing so.

30 By denying experts access nobody knows what caused the explosion and the evidence that was there was not assessed correctly.

Complainant opposes the order sought – summary of complainant's opposition

31 Certain authorities on the defendants' list deal with applications for a permanent stay where there has been destruction of specific exhibits. Identified in those cases was a specific exhibit which had been destroyed and went to a fundamental issue going to the root of the trial such that there is nothing that the Court could do to relieve the unfairness[7]. The submissions made by the defendants have failed to identify anything which would bring them within the authorities relating to the destruction of exhibits. No specific exhibit that has been destroyed or lost has been identified nor has it been established that a specific item may be central to the issue of trial. The defendants have not established anything which would enliven the Court's discretion to grant a stay.

[7] *Barton v R* (1980) 147 CLR 75.

32 The affidavits filed by the defendants make reference to evidence. There is a general reference to evidence that has now been lost by effluxion of time or by deterioration due to exposure or by disturbance by the investigation process. No specific evidence is identified as having been destroyed or lost nor has it been established that such evidence goes to the very issue of the trial and as such that the trial is unfair. The issues raised in the affidavits can be better characterised as a general complaint about the way in which SafeWork focussed and conducted its investigation and a further complaint that the defendants were not able to call in their own experts or indeed direct SafeWork to utilise particular experts.

33 The response to that is that SafeWork is the body charged as the investigator of the workplace incident, not the defendants. No authority has been advanced to indicate that SafeWork is obliged to investigate in the terms suggested by the defendants. To say that the defendants should have been able to conduct a simultaneous investigation is a novel suggestion and contradicts what was said *Police v Sherlock* (supra) and *Police v Pakrou* (supra).

34 The complaint by the defendants that SafeWork did not permit the defendants to access the site to conduct their own investigations is raised in the affidavit material. The complainant does not need to prove the cause of the explosion in order to make out the elements of the offence. The complainant's position is that there were many other acts or omissions that were present prior to the explosion that could form the basis of a finding that the defendants failed to ensure so far as was reasonably practicable that its employees, whilst at work, were safe from injury and risks to health. The complainant does not need to prove the precise cause or the precise sequence of events that actually happened on the day of the incident. The consequence of a contravention and in particular the proof of an accident or injury to an employee is not an element of the offence. It is a matter that is relevant to penalty[8]. The fact that the defendants have been precluded from the site right from the beginning is not a matter which could ever go to the very root of the trial[9].

35 Recent authorities including *Sherlock* (supra) build on the principle set out in the High Court decision[10] which indicates that there is no right to a perfect investigation.

---

[8] *Diemould Tooling Services Pty Ltd v Oaten; Santos Ltd v Markos* (2008) 101 SASR 339; *Softwood Holdings Limited v Stevenson* (1996) 188 LSJS 482; *CSR Limited v Stevenson* (1995) 184 LSJS 204; *Fielders Steel Roofing Pty Ltd v Moore* [2004] SAIRC 62.

[9] Complainant's Outline of Argument paras 14-23 inclusive.

[10] *Penney v R* (1998) 155 ALR 605 at [36].

36 The defendants have failed to identify what evidence, if any, has been lost and what significance, if any, it had. By reference to *Sherlock*[11](supra) all the defendants can say is that they have suffered possible prejudice. It is not unfairness of the kind that might enliven the Court's power to stay proceedings.

37 Further observations made by Chief Justice Doyle in *Sherlock*[12] indicate that a fair trial is not one where the Court has to some how make it an even contest. The legal concept of a fair trial is a much narrower one and it can only be in exceptional circumstances that a Court can decide that the despite the trial proceeding according to law it must be stayed. It is not the function of a Court to try to achieve some kind of equality as between the parties.

38 The defendants' application seems to be mounted on the basis that there should have been some sort of equality between the parties and that Kuzub should have had the same sort of access to the site as SafeWork. As His Honour the Chief Justice states at para 76 in *Sherlock* (supra):

> "It has never been the case that a trial is fair only if all potentially relevant material is available to the parties, or at least to the accused person in criminal proceedings. Such a wide notion of fairness cannot be supported by the authorities".

39 The matters raised in the affidavit material filed by the defendants suggest an incomplete, deficient or badly focussed investigation but the authority of *Sherlock* demonstrates conclusively that such matters do not enliven the power to grant a stay.

Consideration - Conclusions

40 It is agreed that this Court has the power to stay proceedings on the basis that to allow the proceedings to proceed would give rise to an abuse of its process[13].

41 The power to stay proceedings as an abuse of process should be exercised only in exceptional circumstances. The duty of a Court is ordinarily to exercise its jurisdiction and to proceed to hear and determine a matter given that the jurisdiction is properly invoked[14].

42 The approach taken by Mr Telfer was that the application would not be a permanent stay in respect of the charges but would be a stay in respect of the leading of evidence in respect of the ribbon blender. Mr Germein made more general submissions about the methodology of the

---

[11] Paras [82] - [89] inclusive
[12] Paras [65] - [75] inclusive
[13] *Sedmak v Police* [2008] SASC 307 at para 24.
[14] *Sedmak v Police* (supra) at para 25; *Jago v District Court of NSW* (1989) 168 CLR 23.

investigation and the inherent unfairness to the defendants. Mr Germein did concede that his application really required some evidence being led and then perhaps the renewal of the application for a stay at large.

43 I have set out above a summary of the contents of the two affidavits filed in support of the application. What arises from those affidavits is a complaint that the defendants were denied access to the site to carry out their own investigations and that SafeWork SA conducted its investigation in such a way that it was unfairly focussed in one area to the exclusion of any proper investigation of other possible causes.

44 Mr Telfer's discrete application in relation to the particulars that relate to the ribbon blender with respect does not accord within those authorities on the defendants' list which deal with applications for a permanent stay when there has been a destruction of specific exhibits. I am advised that the ribbon blender is not lost. The ribbon blender is located at Netley and the defence have been given access to the ribbon blender and have had at least one expert view the ribbon blender on a number of occasions.

45 The contention made in the affidavits of Kuzub that the investigation was unfairly focussed does not establish a basis for granting the permanent stay. "*There is no general proposition of Australian law that a complete and unexceptionable investigation of an alleged crime is a necessary element of the trial process, or indeed of a fair trial*"[15].

46 Just because all potentially relevant material is not available to the defendants is not a basis upon which a trial could be said to be unfair. As the High Court stated in the *Queen v Edwards*[16]:

> "Trials involve the reconstruction of events and it happens on occasions that relevant material is not available; documents, recordings and other things may be lost or destroyed. Witnesses may die. The fact that the tribunal of fact is called upon to determine issues of fact upon less than all of the material which could relevantly bear upon the matter does not make the trial unfair".[17] (footnotes omitted)

47 The defendants' complaint that SafeWork has focussed on a particular cause and not consulted with proper experts including the second defendant in my view is not such that it could enliven the power to stay proceedings. The complainant has asserted an investigator is not obliged to consult with experts that may be suggested by an employer nor is the investigator obliged to consult with the employer who of course is a

[15] *Penney v R* (1998) 72 ALJR 1316 at 18; *Police v Sherlock* at [73]-[74].
[16] [2009] HCA 20, delivered 21 May 2009 at para 31.
[17] *Police v Pakrou* (2008) 103 SASR 124 at paras 60, 61.

potential defendant during the course of the investigation of a possible criminal offence[18]. With this I agree.

48 There is a general assertion in the affidavits that evidence that the defendants sought to obtain is now lost by effluxion of time. There has been no specific identification of what evidence has been lost and just what significance that evidence would play. There of course could be circumstances in which the loss of admissible evidence could lead to injustice of such a character that it would make the continuation of proceedings an abuse of process of the Court.

49 As His Honour Chief Justice Doyle stated in *Police v Sherlock:*[19]

> "It will only be in exceptional circumstances that the unavailability of evidentiary material that might assist the defendant in criminal proceedings, there being no misconduct by the prosecution (or those for whom it is responsible), and no breach of the obligation of disclosure borne by the prosecution, will support a conclusion that the proceedings are unfair, let alone a conclusion that they should be stayed."

50 The defendants have not satisfied me that an abuse of process exists. I dismiss the defendants' application.

[18] Complainant's Outline of Argument para 27.
[19] supra at para 98.