Bashir v Malogorski [2012] NTSC 64

PARTIES:	BASHIR, Ifram v MALOGORSKI, Mark
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA32 of 2011 (21043546)
DELIVERED:	4 September 2012
HEARING DATES:	4 July 2012
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	Court of Summary Jurisdiction

CATCHWORDS:

APPEAL – Traffic offence – ex parte findings – appeal dismissed.

Australian Road Rules r 20
Justices Act s 63A

REPRESENTATION:

Counsel:

Appellant:	Self-Represented
Respondent:	Mary Chalmers

Solicitors:

Appellant:	Self-Represented
Respondent:	Office of the Director of Public Prosecutions

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

Bashir v Malagorski [2012] NTSC 64
No. JA 32 of 2011 (21043546)

BETWEEN:

IFRAM BASHIR
Appellant

AND:

MARK MALOGORSKI
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 4 September 2012)

Introduction

[1] These are the reasons for dismissing an appeal on 4 July 2012. The appeal was brought against the conviction and fine imposed *ex parte* by a magistrate on 5 December 2011. The appellant was not represented by counsel at the hearing of the appeal. Neither was he represented at the numerous mentions and case management inquiries preceding the hearing despite strong encouragement from myself and counsel for the respondent suggesting he obtain further legal advice or representation.[1]

[1] Case management inquiries took place on 21 December 2011, 4 January 2012, 31 January 2012, 16 February 2012, 17 April 2012, 16 May 2012.

[2] The learned magistrate found the appellant guilty of a charge of speeding.[2] The particulars were that on 28 October 2010 he drove at 110 km/h in an 80 km/h zone. The facts read to the Court were that he was travelling in a blue Toyota Prius lift back, NT registration (TAXI 24) along Tiger Brennan Drive in Darwin. The appellant spoke to the police officer after being apprehended and said, "Please, please, sir, can you let me go? It's my first time. The thing [namely the EFTPOS machine] fell down and I put my foot on the accelerator".[3] The appellant was convicted and fined $250. The prosecution had prepared for a contested hearing and costs were awarded against the appellant in the amount of $300. The appellant was not present in the Court of Summary Jurisdiction when the learned magistrate made the orders.

[3] The sole ground of appeal was that the appellant was not present when the case was heard. Included in the same ground of appeal is an explanation that the appellant was overseas but returned for the hearing; and that he arrived at the Court of Summary Jurisdiction late, (explaining in the same ground of appeal that he was married overseas after a delay).[4]

History of the matter before the Court of Summary Jurisdiction

[4] From the time of the commencement of proceedings before the Court of Summary Jurisdiction there were issues concerning locating the appellant. A warrant of apprehension was ordered on 2 March 2011. The appellant was

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2 The charge was brought under Rule 20 of the *Australian Road Rules*.
3 T3, 10/10/2011.
4 Notice of Appeal 8 December 2011.

unaware of the warrant until 27 July 2011. At the mention of the matter on 27 July 2011 he indicated to the Court of Summary Jurisdiction that he had been overseas and that he would be representing himself. The warrant was vacated and the case adjourned to 7 September 2011 for a contested hearing. For the processing of a speeding charge, the matter has had a fraught procedural history. It seems to me the Court of Summary Jurisdiction displayed a generous attitude towards the appellant concerning his continual problems with appearances in court. I am not suggesting this was inappropriate. There could surely be no criticism that the Court of Summary Jurisdiction did not offer the appellant opportunities to be heard and to explain his difficulties. To illustrate this, I reproduce here the chronology of mentions and hearings in the Court of Summary Jurisdiction prepared by counsel for the respondent at the hearing of the appeal.

Date	**Nature of proceedings**	**Presiding/ Parties**	**Outcome**	**Source**
20 Jan 11	Complaint filed			
2 Mar 11	Mention	Registrar	Warrant to issue	Transcript 02/03/11& Notation on Court File
27 Jul 11	Mention	Fong Lim SM	Appellant appeared, warrant vacated. Adj to 7 Sep 11 for contest mention.	Transcript 27/7/11 & Notation on Court File
7 Sep 11	Contest Mention	Carey SM	Appellant did not appear. SM proceeded ex parte. Finding of guilt. Orders: Convicted and fined $200 + VL	Transcript 07/09/11 & Notation on Court File
7 Sep 11	Contest Mention	Carey SM	Appellant appeared late. Carey SM vacated "scrubbed out" orders and adj to 10 Oct 11 for hearing	Transcript 11/4/12 12.6 & Notation on Court File
10 Oct 11	Hearing	Lowndes SM	Appellant did not appear. Proceeded ex parte. Finding of guilt. Orders: Conv and fine $200 + VL.	& Notation on Court File

?	Application filed to set aside ex parte findings			
14 Oct 11	Mention	Bradley SM	Listed for hearing 10 Nov 11	Transcript 14/10/11 & Notation on Court File
28 Oct 11	Application	Bradley SM	Appellant applied to vacate 10 Nov date as he was going overseas. Orders: hearing date vacated. Adj to 5 Dec 11 for hearing.	Transcript 11/4/12 13.2 & Notation on Court File
5 Dec 11	Hearing	Lowndes SM	Appellant did not appear. Proceeded ex parte. Finding of guilt. Orders: Conv and fine $250 + VL.	Transcript 11/4/12 13.5 & Notation on Court File
	Notice of Appeal filed			
16 Feb 12	Application filed to set aside ex parte findings			
1 Mar 12	Mention	Lowndes SM	Adjourned for hearing to 11 April 2012.	Transcript 01/03/12 & Notation on Court File
11 Apr 12	Hearing of 16 Feb application	Trigg SM	Application dismissed, out of time. Costs $300 against the Appellant.	Transcript 11/4/12 & Notation on Court File

[5] As can be seen, the appellant did not appear on 7 September 2011. The learned magistrate on that occasion proceeded *ex parte*, imposing a conviction and fined him $200 plus a victim's levy. The appellant appeared later on the same day and the learned magistrate "scrubbed out his order without actually formally setting it aside". [5] The matter was adjourned until 10 October 2011, once again for a contested hearing.

[6] The appellant did not appear at that hearing, hence the learned magistrate proceeded *ex parte* and convicted and fined him. The appellant applied to have that order set aside the same day on the basis that he was present at the

[5] T12, 11/04/2012.

Magistrates Court building but that he was in the wrong court room and missed hearing his matter being called on. The learned magistrate on that occasion accepted the appellant's explanation at that time and set aside the conviction and fine. A subsequent mention date was set for 14 October 2011. The appellant was aware of this date and attended court on the allocated date.

[7] At the mention on 14 October 2011 the case was set down again for a contested hearing on 10 November 2011. This date was subsequently adjourned to a later date after an application was made by the appellant to allow him to travel overseas. The case was then listed for a contested hearing on 5 December 2011. The appellant knew the date. With that knowledge he booked flights to go overseas to be married, and stayed overseas longer than he had anticipated.

[8] The appellant did not arrive back in Darwin until 5:30 the morning of 5 December 2011, (the morning of the hearing). He did not attend court at the allocated time. He told this Court he was delayed through Customs and then had a sleep. He has agreed in this Court he was fully aware of the time of the hearing. The orders that are the subject of this appeal were made on the morning of 5 December 2011.

[9] The appellant lodged the appeal against conviction on 8 December 2011. Before this Court at various mentions of the matter, the appellant said lodging the Notice of Appeal was an error. He told this Court he made this

error because of advice from the Registry staff at the Magistrates Court. The appellant submitted he should have been advised to make a written application to the Court of Summary Jurisdiction rather than to this Court. It was suggested to the appellant in this Court that these proceedings could be adjourned to enable him to make an application to set aside the *ex parte* orders, which he eventually did on 16 February 2012.

[10] That application to set aside the order was made outside of the one month time limit specified.[6] On 11 April 2012 a magistrate concluded there was no power to extend time. The learned magistrate noted on that occasion that:

> Even if there were power to extend time, given that this is the third time ex parte orders have been made in this matter and given the defendant's explanation on this occasion, I would not extend leniency to the defendant on the merits and on the facts of this case... In my view enough is enough.[7]

[11] Although not the subject of this appeal, the reasoning of the learned magistrate can readily be appreciated. For the sake of a contested speeding charge, prosecution witnesses had twice attended court, only to find the appellant was not in attendance.

[12] The appellant told the learned magistrate on 11 April 2012 that the reason he was not present at the scheduled earlier hearing was because he had just arrived back from overseas, he had been attending to personal obligations and he over slept. The learned magistrate made the observation that the

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6 *Justices Act*, s 63A.
7 T14, 11/04/2012.

appellant set himself up to fail by travelling through the night and arriving at 5:30 the morning of the hearing.[8]

[13] It was further noted that it was the third time that the appellant had not attended court on time to finalise his matter thus wasting the time of the court, the prosecution and witnesses. Additionally, it was noted that the costs of continuing the hearing of the matter and setting aside the *ex parte* decision would well exceed the fine that would be imposed if convicted. The appellant would lose one demerit point but that would not result in him losing his licence.

The Single Ground Set Out in the 'Notice of Appeal'

[14] As noted, the appeal challenges the order made *ex parte* by the learned magistrate on 5 December 2011 and sets out the reasons for the appellant's absence on that particular morning.

[15] After the *ex parte* order was made on 5 December 2011, the appellant appeared before the same magistrate to have those orders set aside. The learned magistrate told the appellant he had to "fill out an application".[9] Instead of completing and filing an application to set aside an *ex parte* finding of guilt[10] the appellant filed the Notice of Appeal under consideration. The appellant raised the argument that he had been given the wrong form when he attended at the Criminal Registry however no evidence was given to this court to that effect and no hearing enabling findings to be

8 T4, 11/04/2012.
9 T 5 December 2011, P7.
10 S 63A(1) *Justices Act*.

made was conducted. If the appellant believes he received wrong advice, that is a matter he may wish to pursue elsewhere. It does not affect the outcome of this Appeal. At the time of filing the Notice of Appeal there had been no adjudication by any magistrate on the question of whether the appellant had a valid reason for being late and whether the *ex parte* finding should be set aside.

[16] It is clear the learned magistrate was entitled to make the *ex parte* finding of guilt on the basis of the complaint and a précis of the facts read by the prosecutor. Section 62AB(1)(b) *Justices Act* provides as follows:

> (1) Where the Court proceeds ex parte in pursuance of, and in accordance with, section 62(b) or 62A(b) to hear and adjudicate upon a complaint, it may in so doing, in respect of the complaint, regard:
>
> (b) an allegation contained in that complaint where that complaint is a complaint made on oath in accordance with the requirements of section 50(3)(b);

[17] The learned magistrate was entitled to rely on particulars contained in the complaint. Although the précis is not strictly an allegation contained in the complaint, the complaint itself provided enough information: "On 28 October 2011 at Darwin drove a vehicle, namely a Toyota Prius lift back NT "TAXI 24" on a road namely Tiger Brennan Drive, at a speed over the speed limit, namely 110 km/hour, where the speed limit applicable to that length of road was 80 km/hour". The fact the précis was read to the Court does not

detract from the fact the learned magistrate had sufficient particulars on the complaint to make a finding of guilt.

[18] In my view the learned magistrate was not in error when he declined to entertain an oral application to set aside the order. Section 63A(1) expressly requires that an applicant serve a "written application" on the clerk of the court.

[19] The appellant at various mentions of the matter in this court has stated that he wanted an opportunity to put a defence in terms of the EFTPOS machine in his car falling down and as a result he put his foot on the accelerator. He has explained that a number of times to this court. The problem for the appellant is that he, like other persons in a similar situation need to attend court as notified if they wish to challenge allegations in a traffic infringement notice.

[20] The history of non-appearances by the time the learned magistrate dealt with the matter on 5 December 2011 was already voluminous. To examine whether the appellant was given the wrong form to set aside the conviction would have required him to obtain evidence. There was some acknowledgment although by no means clear that the appellant may have been given a notice of appeal rather than application to set aside the conviction. This is why the appellant was given an opportunity during the course of these proceedings to make the application to the Court of Summary Jurisdiction. Even with such evidence and even if it had not been

ruled out of time, it is not clear that an application to set aside would have been successful. Indeed, the indications are that it would not have been successful. There was an entrenched history of non appearance on the part of the appellant. At the time the case needed to be brought to a conclusion. In my view it was an entirely appropriate case to deal with on an *ex parte* basis. The appellant did not file an application to set aside in the Court of Summary Jurisdiction, save that the notice of appeal seeks a similar determination.

Conclusion

[21] The appeal was dismissed. The orders made by the learned magistrate on 5 December 2011 convicting the appellant and imposing a $250 fine and awarding costs to the prosecution in the amount of $300 were confirmed.

[22] Brief reasons were given to the parties at the hearing on 4 July 2012. With the agreement of the parties and to save further appearances in this Court, these reasons will be posted to the parties.

[23] The respondent did not seek costs of this appeal.

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