

DPP (NSW) v A MAGISTRATE & anor.

Supreme Court (NSW) No. 11243/2003

Judgment of Dowd J delivered 29 August 2003

COURTS AND JUDGES - BIAS - PREJUDGMENT OF ISSUE

On 10 March 2003, the first defendant (the magistrate) commenced hearing criminal proceedings brought by the plaintiff (DPP) against the second defendant (D2) in the local court at Burwood, in Sydney. D2 is a police officer and a former police prosecutor. His surname is Thurbon, and he was charged with dishonesty offences.

On 12 April a female clerk in the NSW Police Department unexpectedly received a copy of an e-mail on her home computer. Ms Thurbon is not related to D2. The magistrate was the author of the message, which he had only intended on 12 April to send from his home computer to his Chamber computer on the Attorney-General's domain site. An attachment to the e-mail was a document in which the magistrate summarised a portion of the trial, which by this stage was part heard over five days. In the document, the magistrate referred to the prosecution case, and the conduct of the prosecutor, in terms that included:

I babbled on about completeness relating to the link between the payslips and the evidence from ms... In many respects (the prosecutor) is misleading.

On 17 April police lodged a complaint against the magistrate with the NSW Judicial Commission, alleging that he had either deliberately or negligently disseminated an e-mail concerning a matter which he was currently hearing. On 9 May the magistrate refused an application by the DPP that he disqualify himself from further hearing the charges against D2. In his judgment, the magistrate elected to explain to the parties (in closed court) how a somewhat complex problem with a computer program (Lotus Notes) had caused a copy of his e-mail to be accidentally transmitted to Ms Thurbon's computer.

The DPP applied to the Supreme Court for an order in the nature of prohibition against the magistrate, and declaratory relief. The magistrate and D2 filed submitting appearances except as to costs.

HELD

A. The integrity of the trial was compromised by the disclosure to the parties of the magistrate's views on various matters concerning the part heard proceedings.

B. It cannot be said that the general "informed, reasonable bystander"¹ would understand the particular problems of the Lotus Notes program and, despite the reasonableness of the magistrate's explanation, there is a "real possibility"² that such a person may harbour an apprehension that the magistrate *intended* to communicate with D2 and was therefore biased.

ORDERS

1. Declaration that the magistrate erred in declining to disqualify himself from further hearing the proceedings against D2.

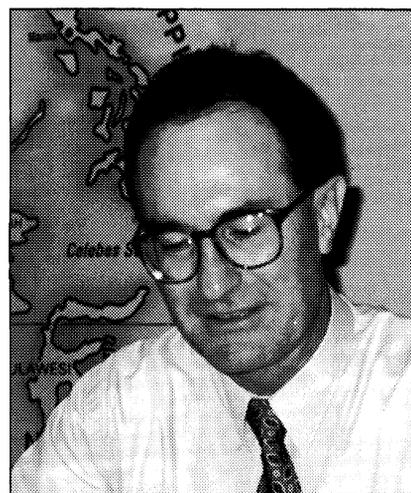
2. The magistrate is prohibited from further hearing the proceedings against D2.

3. No order as to costs.

Justice Dowd rejected the DPP's submission that the magistrate's notes demonstrated prejudgment of the prosecution case:

...judicial officers must be able to make notes as a case progresses about aspects of the case, the parties and those appearing before them. It is inevitable that provisional views will be formed subject to displacement or confirmation by later evidence.

His Honour was advised by the DPP that the Judicial Commission had dismissed the complaint against the magistrate. Justice Dowd described the magistrate's decision on 9 May to give evidence from the bench as to the



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likely cause of the transmission to Ms Thurbon as "unfortunate".

ENDNOTES

1 In *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 293-295, the High Court chose the term "fair-minded observer".

2 *Ebner v Official Trustee* (2000) 75 ALJR 277 at 279 (High Court).

APPEARANCES

Plaintiff - Knox SC / SE O'Connor

First Defendant - IV Knight

Second Defendant - Taylor & Scott Lawyers

COMMENTARY

Some readers may understand how the magistrate's Lotus Notes program's "...recently acquired facility of searching for names in the address line" caused the name Thurbon to "flip up" from the subject line to the address line of the e-mail.

This case is a cautionary tale for the senders of sensitive e-mails.^①