26/69

SUPREME COURT OF VICTORIA

MEREDITH v ANDREASEN

McInerney J

13 November 1969

PRACTICE AND PROCEDURE – AUTHORITY TO PROSECUTE – ESTATE AGENT ALLEGED TO HAVE PUBLISHED MISLEADING STATEMENT – INFORMATION ISSUED AGAINST ESTATE AGENT BY AN INVESTIGATOR ATTACHED TO THE REGISTRAR OF ESTATE AGENTS OFFICE – REQUIREMENT THAT ANY OFFICER OF THE DEPARTMENT OF THE TREASURER IF AUTHORISED IN WRITING MAY PROSECUTE FOR BREACH OF THE *ESTATE AGENTS ACT* – REQUIREMENTS OF THE ACT NOT FULFILLED – NO EVIDENCE THAT INFORMANT WAS AN OFFICER OF THE DEPARTMENT OF THE TREASURER – WHETHER OFFENCE OF A PUBLIC NATURE – WHETHER ANY MEMBER OF THE PUBLIC MAY LAY AN INFORMATION IN THIS CASE – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *ESTATE AGENTS ACT* 1958, SS29(3), 51A.

HELD: Order nisi absolute. Dismissal set aside. Remitted to the Magistrate to be heard and determined in accordance with the law.

1. The evidence led by the informant in relation to his authority to prosecute, did not establish that the informant had fulfilled the requirements of s51A of the *Estate Agents Act* 1958 ('Act').

2. There was no evidence before the Magistrate on which he could find that the informant was an officer of the Department of the Treasurer within the meaning of s51A of the Act.

3. The purpose of s51A of the Act fulfils a useful purpose in two respects. First of all, an informant who comes within its terms, who is, in other words an officer of the Department of the Treasurer, authorised in writing by the Treasurer, either generally or in the particular case, is thereby relieved of the necessity of showing that the offence for which proceedings have been instituted is an offence of a public nature.

4. A person who complies with the terms of s51A of the Act puts beyond any doubt his capacity to prosecute for breach of the regulations or rules. So understood, s51A fulfils a useful purpose, while in no way derogating from the useful general principle that in the case of an offence of a public nature any member of the public may lay an information.

McINERNEY J: This is the return of an order nisi granted by Master Bergere on 2 May 1969 to review a decision of the Court of Petty Sessions at Melbourne, constituted by Mr A Foley, Stipendiary Magistrate, on 31 March 1969, whereby it was ordered that an information laid by the informant, Owen William Meredith, against Rudolph Andreasen, should be dismissed, should not be reviewed and set aside on 4 grounds, namely,

> (1) that the Stipendiary Magistrate was wrong in holding that no evidence had been produced on behalf of the informant to show that at the material time the informant was duly authorised to prosecute the information.
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> (2) that in the circumstances of the case, the Stipendiary Magistrate should have held that the oral evidence of the informant that at the time of swearing the information he had a general authority to prosecute was sufficient evidence that he was so authorised.
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> (3) that the Stipendiary Magistrate was wrong in dismissing the information only because no evidence had been produced by the informant to show that at the material time he was authorised by the Treasurer to prosecute the offence charged, and
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> (4) that the Stipendiary Magistrate should have held that the informant might properly lay the information whether or not he had been authorised to do so, pursuant to s51A of the *Estate Agents Act*.

The information charged that the defendant, on 28 August 1967 at Greensborough, being an estate agent, did, contrary to s29(3) of the *Estate Agents Act* 1958, permit to be published, as

part of an advertisement, a misleading statement to wit, "Water reticulated at vendor's expense" concerning property known as Comely Bank Estate, which was stated to be for sale. The information was laid under s29(3) of the *Estate Agents Act* 1958, which provides as follows -

> "Any estate agent who publishes or permits or authorises to be published, whether in a newspaper or otherwise, as part of any advertisement, any false or misleading statement or representation concerning any property or business which is or is stated or represented to be for sale, shall be guilty of an offence against this Act."

At the conclusion of the informant's case, Mr Brown, who appeared as counsel for the defendant, made a submission that the information should be dismissed as the informant had not produced his written authorisation as required by s51A of the *Estate Agents Act*, and after hearing submissions from Mr Brown and from Mr Monahan of counsel for the informant, and after allowing Mr Monahan to re-open the informant's case and to recall the informant to give further evidence concerning his written authority to act, the learned Stipendiary Magistrate, after hearing further submissions from counsel, dismissed the information.

His reasons for so doing are stated in para. 18 of the affidavit of Bruce Lester Oldham, sworn 30 April 1969, in support of the application for the order nisi. According to that affidavit, the Magistrate, after retiring for some 15 minutes to consider his decision, on returning to the Bench, gave his decision in the following words. He said -

> "Section 51A of the *Estate Agents Act* 1958 reads as follows - 'Any officer of the Department of the Treasurer, authorised in writing by the Treasurer, either generally or in any particular case, may prosecute for any breach of, or offence against this Act or the regulations or rules."

He added

> "In the case before me no evidence has been produced on behalf of the informant to show that at the material time the informant was authorised in accordance with the provisions of s51A, therefore the information in this case must be dismissed."

Accordingly, he dismissed the information and awarded $31 costs against the informant.

The evidence led by the informant in relation to his authority to prosecute, did not, in my view, establish that the informant had fulfilled the requirements of s51A. When the informant was called to give evidence, he swore, according to para. 7 of the affidavit of Mr Oldham, as follows

> "At the time of this offence I was an investigator attached to the Registrar of the Estate Agents Office. I am no longer with this particular department."

Then he went on to deal with the merits of the case. When he was recalled after lunch, in response to the leave given to Mr Monahan to re-open the case for the informant, he was asked whether at the time of swearing the information he had general written authority to act, and he replied "yes". He was then asked if he knew the present whereabouts of such written authority. He replied, "No." He further stated that on leaving the department, be had handed in his written authority and that efforts to find the said authority over the luncheon adjournment had been of no avail.

The offence charged is alleged to have occurred on 28 August 1967, and the information was issued on 23 May 1968. There is no evidence that the office of the Registrar of Estate Agents is administered as part of the Department of the Treasurer, and in my view there was no evidence that the informant was an officer of the Department of the Treasurer.

Mr Brown, in his argument, has submitted that the whole presentation of the case for the informant in the Court below, in relation to the question whether the informant had authority to prosecute, proceeded on the basis that the informant was an officer at the Department of the Treasurer, that the informant had put himself forward as a person who could be authorised to be an informant under s51A, and who had in fact been authorised under s51A.

It seems to me likely that the assumption was made by the defence that the informant

was in fact an officer of the Department of the Treasurer, and the defence may, in truth, have considered that the real battleground was whether the informant had been authorised in writing by the Treasurer, either generally or in this particular case, to prosecute the defendant for a breach of the Act. But however that may be, assumptions made by the defence can seldom take the place of actual evidence, and I am not satisfied, on the material before me, that the case was in fact conducted on the footing of it being common ground that the informant was an officer of the Department of the Treasurer.

Consequently, in my view, there was no evidence before the Magistrate on which he could find that the informant was an officer of the Department of the Treasurer, within the meaning of s51A.

That brings me to the question whether the terms of s51A are apt to exclude the general common law rule that in the case of an offence of a public nature any member of the public may lay an information.

The general rule, to which I have referred was stated many years ago in *Sargood v Veale* in the Full Court, [1891] VicLawRp 127; (1891) 17 VLR 660 at pp662-3; 13 ALT 212, by Chief Justice Higinbotham, who said –

> "The right to lay an information for offences created by statute, depends on the intention of the legislature as expressed in the terms of the statute. An information for an offence against an enactment, for the benefit of the public at large, may in general be laid by anyone, independently of any authority from the party, or parties, to whom the penalties, to be recovered are awarded by law and in such a case, where no form of information is expressly authorised, the information should purport to be laid in accordance with the law which determines the parties for whose benefit the penalties are to enure, wholly or in part. A different rule applies in cases where the act prohibited by statute is a grievance to an individual only, in respect of which a penalty is given by statute to the party aggrieved by way of redress (see per Cockburn LJ in *Cole v Coulton*) [1860] EngR 625; (1860) 2 E & E 695; 121 ER 261; 29 LJMC 125; 2 LT 216; (1860) 24 JP 596 or where the offence is against an enactment relating to a matter of purely local concern, and not of general interest or affecting the general public *R v Hare, ex parte Bush* [1887] VicLawRp 17; (1887) 13 VLR 71) or where the offence charged is the breach of a law the enforcement of which is committed by statute to the local authorities (*R v Panton ex parte Schuh* [1888] VicLawRp 91; (1888) 14 VLR 529; 10 ALT 115 and see as to this case *Keane v Schuh* [1890] VicLawRp 45; (1890) 16 VLR 199. In any of these cases, an information cannot be laid by a person who is not interested in the penalty and who is not duly authorised to lay the information by a party interested or by statute."

That general rule has been repeatedly recognised and acted on in our Courts, and was restated most authoritatively by the Full Bench of this Court in *Armstrong v Hammond* [1958] VicRp 77; [1958] VR 479 at pp480-1; [1958] ALR 940 1956 P.R. 479, where the Full Bench said –

> "The true rule as laid down in *Sargood v Veale* and in decisions of the High Court in England, is that, *prima facie*, anybody may lay an information for the enforcement of an Act. Before *Sargood v Veale* this Court was disposed to hold otherwise, but in that case it was pointed out that the authorities relied on in previous decisions, had been cases of *qui tam* actions and informations and that they did not refer to informations for criminal offences."

Most recently, the law has been laid down to similar effect in the Full Court in *Deveney v Sturt* [1969] VicRp 20; [1969] VR 174 at p176; (1968) 26 LGRA 210. In that case the Court was considering the provisions of s86(1) of the *Summary Offences Act* 1966, which provides that unless otherwise expressly provided, any member of the police force, or any inspector or other officer of the Department of Health, or of the council of any city, town, borough, or shire, as the case requires, may lay an information for a breach of or an offence against any of the provisions of this Act." It was held that the provisions of that section did not exclude the common law rule to which I have referred.

The provisions of s51A are not, in my view, distinguishable from the provisions of s395(1) of the *Health Act* 1928, now s435(1) of the *Health Act* 1958, which were considered by Martin J in *Robertson v Nesci* [1948] 2 ALR 382 at pp383-4. The section there considered provided that 'any authorised officer of the Department, or of any council, or of any authorised member of the police force, may prosecute for any breach of an offence against this Act.' Martin J held that that section did not, by implication, exclude the right of others to prosecute for offences against the Act.

Mr Brown did not seek to argue that s51A had the effect, by implication, of excluding by its terms the right of anyone else to lay an information. He did, however, put two arguments; the first was that the offence created by s29(3) was not an offence of a public nature, and that the enactment offended against was not an enactment for the benefit of the public at large. Secondly, he put a more subtle argument, namely, that s51A did not exclude the common law right of an individual to prosecute for an offence of a public nature, or for breach of an enactment, enacted for the benefit of the public at large, save in one case, namely, where the member of the public who sought to lay an information was an officer of the Department of the Treasurer, and in such case, that particular member of the public could lay an information only within the terms of s51A, that is to say, if authorised in writing by the Treasurer, either generally or in any particular case.

To deal with the arguments in turn, it was said by Mr Brown, in support of the first argument, that the provisions of s29(3) were enacted for the benefit only of a very small class of persons, namely, the persons who were misled by the advertisement, alternatively, it was enacted for the benefit of prospective purchasers, alternatively, it was enacted for the benefit only of actual purchasers. He suggested that since the enactment was for the benefit of a limited category of persons of that kind, it could not be said to be, as I understood his argument, an enactment for the benefit of the public at large.

I am unable to accept that argument. First of all, the question whether an enactment is for the benefit of the public at large, or whether an offence is an offence of a public nature, is not necessarily to be determined by the number of people who may be affected by a breach of enactment, or by the commission of the offence. As Mr Tadgell rightly pointed out, in *Armstrong v Hammond* at p481, it was said that simple larceny is clearly an offence against the public, even though only one person may be affected by it. The Court said 'larceny is clearly a crime in respect of which any member of the public may lay an information.'

Secondly, it appears to me that when regard is had to the purpose of the enactment, an element of public interest is evident therein. In my view, s29(3) is directed to the maintenance of a proper standard of truth and honesty in advertisements, and in particular in advertisements by estate agents, and that the public have an interest in seeing that estate agents do not publish or permit, or authorise to be published, as part of any advertisement, any false or misleading statement. I am of the opinion therefore that this is a section to which the general rule does apply and that any member of the public may lay an information, independently of s51A.

The purpose of s51A is not, in my view, to be restricted in the fashion suggested by Mr Brown in his second argument. So to construe s51A would be extremely stultifying. Section 51A fulfils a useful purpose in two respects. First of all, an informant who comes within its terms, who is, in other words an officer of the Department of the Treasurer, authorised in writing by the Treasurer, either generally or in the particular case, is thereby relieved of the necessity of showing that the offence for which proceedings have been instituted is an offence of a public nature. There may well be, as Mr Tadgell suggested, a number of instances of offences created under this Act which are not offences of a public nature. I express no view one way or other on that: it is sufficient to say that such instances may occur.

Secondly, a person who complies with the terms of s51A puts beyond any doubt his capacity to prosecute for breach of the regulations or rules. So understood, s51A fulfils a useful purpose, while in no way derogating from the useful general principle, to which reference is made in *Armstrong v Hammond*, *Deveney v Sturt* and *Sargood v Veale* and numerous other cases, and to which reference was made in *Stephen's History of the Criminal Law*, Vol. 1 Chapter 14, cited in the article by Mr Kevin Anderson, as he then was, *The informant and his authority to prosecute* in (1942) 15 ALJ 310, namely, –

> "No stronger or more effectual guarantee can be provided for the due observance of the law of the land by all persons under all circumstances than is given by the power conceded to everyone by the English system of testing the legality of any conduct of which he disapproves, either on private or public grounds by a criminal prosecution."

In the result, the Magistrate was, in my view, in error in dismissing the information, and the order nisi will be made absolute on grounds number 3, and 4. Dealing with ground 1 I do not think that it could be said the Magistrate was wrong in holding that no evidence had been produced

on behalf of the Informant to show that at the material time the informant was duly authorised to prosecute the information. I think on the material before him the Magistrate was entitled to hold that no evidence had been produced to show that the informant was duly authorised within the terms of s51A.

Secondly, for the reasons I have already advanced, I also think that ground 2 of the order nisi is not made out and that it could not be said that in the circumstances of the case, the Stipendiary Magistrate should have held that the oral evidence of the informant that at the time of swearing the information he had a general authority to prosecute was sufficient evidence that he was so authorised. In saying that, I am proceeding on the basis that the real vice of the evidence was that there was no evidence that the informant was an officer of the Department of the Treasurer, and I express no opinion as to whether the evidence given by the informant, when he was recalled, was or was not sufficient to show that he had an authority in writing from the Treasurer. It is not to be taken however that I am satisfied that the evidence did suffice for that purpose.

The result therefore is that the order of the Court will be that the order nisi be made absolute on grounds 3 and 4. The order of the Court of Petty Sessions, Melbourne constituted by His Worship, Mr A Foley, Stipendiary Magistrate, on 31 March 1969, dismissing the information, is set aside, and the information is remitted to the Court of Petty Sessions at Melbourne, to be heard and determined according to law. Order that the informant's costs of the order to review including any reserved costs, be taxed, and when so taxed, be paid up to an amount not exceeding $120 by the defendant. The application for a certificate under the *Appeal Costs Fund Act* 1964, is refused.

APPEARANCES: For the informant Meredith: Mr RC Tadgell, counsel. Thomas F Mornane, Crown Solicitor. For the defendant Andreasen: Mr NA Brown, counsel. Carew, Hardham & Co, solicitors.
