8/96

SUPREME COURT OF VICTORIA

KELLY v VON EINEM and ORS

O'Bryan J

9 November, 4 December 1995 — (1995) 84 A Crim R 37

PROCEDURE – ALTERATION OF COURT ORDER MADE IN CRIMINAL PROCEEDING – "MISTAKE" OR "SLIP" – WHETHER COURT MAY CORRECT SUCH ERROR – WHETHER ORDER PRONOUNCED ORALLY AND ENTERED ON THE COMPUTER RECORD IS A "MISTAKE" OR "SLIP" – WHETHER CAPABLE OF CORRECTION.

1. An inherent jurisdiction exists in the Magistrates' Court to correct on a later date an error in an order arising from a "mistake" or "slip" or "accidental omission".

2. Where a magistrate announced in court that a person was convicted on a certain charge and the entry on the computer record was consistent with the oral findings, no "mistake" or "slip" was made. Accordingly, the computer entry was not capable of amendment or variation on a later date.

O'BRYAN J: [1] This is a proceeding by originating motion (Rule 56 of the *General Rules of Procedure in Civil Proceedings* 1986) and summons thereon by which the plaintiff seeks judicial review of an order made by a Magistrate in the Magistrates' Court at Kyneton on 3 July 1995. An order was made that the computer record of the Court be amended to show that the plaintiff was convicted on 16 January 1995 on information of an offence against s49(1)(b) of the *Road Safety Act* 1986 (charge 2) in lieu of the existing computer record which showed that charge 2 had been struck out or withdrawn on that day. The facts relating to the charges may be summarised as follows. On 9 April 1994, a few minutes after 10.15 p.m., police officer Sergeant John Rogers stopped a motor vehicle in which the plaintiff (Wayne John Kelly) was seated in the passenger's seat and his son Brett Kelly was seated in the driver's seat of the car. At 10.15 p.m. the plaintiff had been observed by Rogers driving the vehicle and then stopping the vehicle to change his seat in the car with his son. At 1.54 a.m. the plaintiff furnished a sample of his breath for analysis which showed a blood alcohol reading of 0.120%. Brett Kelly was also breath tested and a sample of his breath exceeded the legal limit. The test carried out on the plaintiff was 3 hours and 39 minutes after he was observed driving a motor car.

The plaintiff was charged on information with five offences including charge 2 (contravening s49(1)(b) of the Act) and charge 3 (contravening s49(1)(f) of the Act). Brett Kelly was also charged with a number of offences including a **[2]** charge of contravening s49(1)(b) of the Act and a charge of contravening s49(1)(f) of the Act. Section 49(1)(b) creates an offence if a person drives a motor vehicle or is in charge of a motor vehicle while more than the prescribed concentration of alcohol is present in their blood. Section 49(1)(f) creates an offence if a person within 3 hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a breath analysing instrument under s55(1) and –

> (i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that more than the prescribed concentration of alcohol is present in their blood; and
>
> (ii) the concentration of alcohol indicated by the analysis to be present in his or her blood was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle.

Quite clearly, charge 2 was an alternative charge to charge 3. Upon conviction on either charge 2 or charge 3 the other charge would be struck out or withdrawn and not determined on its merits. At the hearing on 16 January 1995 the plaintiff and Brett Kelly were not represented by a lawyer and the plaintiff did not contest the prosecution evidence by cross-examination or give sworn evidence in his defence. A relevant conflict exists in the material before this Court as to the findings pronounced by the Magistrate in the case against the plaintiff. The plaintiff has deposed that the Magistrate convicted him on charge 3 and imposed a **[3]** sentence of imprisonment

suspended for two years and disqualified him from obtaining a driver's licence for three years. The plaintiff has further deposed that charge 2 was struck out. The plaintiff's evidence as to the Magistrate's findings is supported by entries made on the Court computer record by the learned Magistrate on 16 January 1995.

The Court's register is a computer record and is evidenced by Ex. E to the affidavit of the plaintiff. Sergeant John Rogers, the second defendant, deposed that in respect of the plaintiff "the Magistrate said that he found the charges of contravention of s49(1)(b) of the Act, giving false name and address and possession of drug of dependence proved and that the plaintiff would be convicted on these charges". Sergeant Rogers further deposed that the charge of contravening s49(1)(f) of the Act was ordered by the Magistrate to be struck out. The affidavit of Sergeant Rogers does not reveal whether he made a contemporaneous record of the Magistrate's findings or is relying upon his memory. In the absence of production of a document, I conclude the latter is the case. In the case of Brett Kelly, Sergeant Rogers deposed that the Magistrate said that he found charges of contravention of s49(1)(f) of the Act and giving a false name and address proved and that Brett Kelly would be convicted. Sergeant Rogers further deposed that the charge of contravention of s49(1)(b) of the Act was ordered by the Magistrate to be struck out.

Sergeant Roger's evidence is inconsistent with a handwritten memorandum or record on the police brief made on 16 January 1995 by the police prosecutor, Senior Constable **[4]** Martin Griffin, of the decision in relation to the plaintiff on charge 3. The memorandum records that the plaintiff was convicted on charge 3. This document was produced by Mr Golombek of counsel who appeared for Sergeant Rogers, the second-named defendant. The handwriting is on a pro-forma typed document and purports to record the result of the Kyneton Court proceeding against the plaintiff on 16 January. The document lists seven charges and records that charges 1 and 7 were adjourned *sine die*. The document records that the plaintiff pleaded not guilty to charges 2, 3, 4, 5 and 6. The Court's decision in respect of charge 2 is not recorded. The Court's decision in respect of charge 3 is recorded in an abbreviated form: "CV (convicted). Sent (Sentenced) to 2 mths (months) Sus (suspended) 2 yrs (years) Disq (Disqualified) 3 yrs (years)."

This handwritten memorandum of the prosecutor purporting to record the decision of the Court is consistent with the result entered in the computer record on 16 January 1995 by the learned Magistrate. How did the prosecutor record in handwriting the result in respect of charge 3 in the same terms as the computer unless he heard the learned Magistrate announce in Court that he found charge 3 proved and intended to convict the plaintiff and impose the penalty written on the document? The inference which I draw from the document is that the learned Magistrate announced in Court that he found charge 3 proved and proceeded to convict the plaintiff and impose a penalty.

I should add that Mr Golombek very properly brought to the attention of the Court the handwritten memorandum from **[5]** the police brief made by the police prosecutor. It is unfortunate that the maker of the document, Senior Constable Griffin, did not refer to the document in his affidavit. An inconsistency exists between his recollection of the decision orally announced by the learned Magistrate and the document produced in this proceeding by Mr Golombek. Senior Constable Griffin made an affidavit in which he deposed that he read a copy of the affidavit of Sergeant Rogers filed in this proceeding and that the contents of paragraphs 4, 5, 6, 7, 8 and 9 are true and correct. The effect of Mr Griffin's evidence is that he recollects that the Magistrate found charge 2 proved and saying that the plaintiff would be convicted on charge 2.

There is no doubt that a serious conflict exists between the recollections of Sergeant Rogers and Senior Constable Griffin on the one hand and the recollection of the plaintiff on the other as to the Magistrate's findings in relation to charges 2 and 3. The only contemporaneous note of what was said by the Magistrate before the computer record was made supports the plaintiff's evidence. The learned Magistrate did not make an affidavit. The plaintiff deposed that on 8 June in the Magistrates' Court at Kyneton the Magistrate said he had no notes of the hearing on 16 January. The substantial dispute is whether the Magistrate announced on 16 January that the plaintiff would be convicted on charge 2 or whether he said that charge 2 would be struck out.

The *Road Safety Act* 1986 provides in s49(1)(b) that a person is guilty of an offence if he drives a motor vehicle **[6]** while more than the prescribed concentration of alcohol is present in his blood. The uncontested evidence in the Court below clearly entitled the learned Magistrate to

convict the plaintiff on charge 2. Section 49(1)(f) provides that a person is guilty of an offence if he, within three hours after driving a motor vehicle, furnishes a sample of breath for analysis by a breath analysing instrument under s55(1) and the result of the analysis shown by the instrument indicates that more than the prescribed concentration of alcohol is present in his blood and the concentration of alcohol indicated by the analysis to be present in his blood was not due solely to the consumption of alcohol after driving the motor vehicle. The evidence in the Court below clearly did not entitle the learned Magistrate to convict the plaintiff on count 3 for the plaintiff furnished a sample of breath more than three hours after he was observed driving a motor vehicle.

The plaintiff appealed the conviction recorded on the computer record on charge 3 and the appeal came on for hearing in the County Court at Bendigo on 9 March 1995. The plaintiff has deposed that "the prosecutor announced to the County Court that the evidence available would not support a conviction on charge 3 and the appeal would have to be upheld" and further announced that he was instructed that a fresh charge alleging contravention of s49(1)(b) would be laid and sought an adjournment to enable that information to be laid and dealt with. The appeal was then adjourned sine die and a certificate under the *Appeal Costs Fund Act* was granted.

[7] Sergeant Rogers' affidavit explains the proceeding in the County Court differently. He deposed:

> "Immediately after the hearing the plaintiff lodged a notice of appeal. As was subsequently discovered such appeal was not against the order of the (learned magistrate) in relation to the contravention of s49(1)(b) of the Act as pronounced by him in court but against the order in relation to the contravention of s49(1)(f) of the Act which the (learned magistrate) recorded in the court computer." (Underlining for emphasis.)

Sergeant Rogers also deposed:

> "As was subsequently discovered such appeal was not against the order of (the magistrate) in relation to the contravention of s49(1)(b) of (the Act) as pronounced by him in court but against the order in relation to the contravention of s49(1)(f) of the Act) which (the magistrate) recorded in the court computer". (Underlining for emphasis.)

He further deposed:

> "... on 29 March 1995. It was then that I for the first time discovered that the orders recorded in the court computer on 16 January 1995 in respect to the charges of contravention of s49(1)(b) and 49(1)(f) were different to the orders pronounced by (the magistrate) in respect of those charges in court on that day." (Underlining for emphasis.)

On 8 June in the Magistrates' Court at Castlemaine Sergeant James applied to the Magistrate who had determined the case on 16 January to amend the Court record to show that the conviction and penalty recorded in respect of charge 3 was actually in respect of charge 2 and that charge 3 was struck out not charge 2. A notice of application "to amend entry of record or result in Magistrates' Court hearing", dated 1 June 1995, which had been served on the plaintiff, asserted that the entry made by the Magistrate on 16 January in respect of the **[8]** plaintiff "does not correctly state the matters decided or intended and an amendment to such order is sought to reflect the Court's true intention." Counsel representing the plaintiff submitted to the Magistrate that no error existed on the computer record that the learned Magistrate had no jurisdiction to amend or alter the register and that before the learned Magistrate determined whether or not a mistake had been made in the computer, he should first hear evidence. Sergeant James, who appeared on behalf of Sergeant Rogers, the informant, submitted to the Magistrate:

> "that he should amend the court recorded orders of 16 January in relation to the informations against the plaintiff so that the court records would reflect the actual orders pronounced by the magistrate in court on that day." (Underlining for emphasis.)

The learned Magistrate reserved his decision. On 19 June the learned Magistrate published "reasons for decision". He determined that he had made an error and had intended to convict and impose a penalty on charge 2 and to strike out charge 3. The learned Magistrate's reasons include the following:

> "Indeed this appears to accord with the evidence on that day and it is my recollection of what happened. It seems to me I have made a 'mistake' or 'slip' in making my entry on the computer."

In my opinion, only the learned Magistrate could determine what he intended to do on 16 January in relation to charge 2 and charge 3. However, the reasons published by the learned Magistrate do not show clearly whether he was able to recall the findings which he announced orally in Court on 16 January 1995. Whether it is the learned Magistrate's **[9]** recollection that he announced in Court that the plaintiff would be convicted on charge 2 is far from clear and is of critical importance to this proceeding. As I have already indicated, Sergeant Rogers and Senior Constable Griffin deposed that the learned Magistrate announced that he found charge 2 proved and the plaintiff deposed that the Magistrate announced that he found charge 3 proved.

The conflict in the material before this Court as to the oral findings of the learned Magistrate is difficult to resolve. The practice whereby the affidavit of the party supporting the decision of the Court below is preferred in the event of its conflicting with the affidavit of the opposite party, is one which may be departed from in proper cases: *Thomson v Cross* [1954] VLR 635. Unfortunately, as I have said, the learned Magistrate's reasons for decision do not clarify whether it was his recollection on 19 June that he announced in Court on 16 January that the evidence proved the plaintiff was guilty on charge 2. If the learned Magistrate announced in Court on 16 January that the evidence proved the plaintiff was guilty on charge 3, the entry on the computer of a conviction and penalty on charge 3 was not a "mistake" or "slip" but an entry consistent with the orally announced findings. It could not be amended or varied on 3 July.

I am compelled to resolve the conflict in the material in favour of the plaintiff's account "that on 16 January the Magistrate announced that he was convicting me on the charge under s49(1)(f)" (charge 3). The notice of appeal related to charge 3, in accordance with the Court record, and neither the prosecutor, nor the informant, nor any Court **[10]** official, questioned the fact that the appeal was in respect of charge 3. My finding is fatal to the argument presented by Mr Golombek because there was no "mistake" or "slip" on the computer record which could be corrected on 3 July. Had the learned Magistrate announced that he found the evidence supported a conviction for an offence against s49(1)(b) (charge 2) and proceeded to enter on the computer record that charge 2 was struck out, the Court probably possessed an inherent power to correct the "mistake" or "slip" on the computer on a later date but it is unnecessary for me to decide this question. Although there is no express statutory power in the Magistrates' Court to correct an error in an order arising from a "mistake" or "slip" or "accidental omission" I consider an inherent jurisdiction exists in a Magistrates' Court to correct an error in the record on a later date.

A recent decision of the Court of Appeal supports the submission of Mr Golombek, in my opinion. In *De Zylva* (1988) 38 ACR 207 the Full Court issued a supplementary judgment in June to correct an internal inconsistency in its order handed down in February. The Chief Justice said, on behalf of the Court, at 208:

> "Any court has an inherent jurisdiction to correct any judgment or order which owing to error does not give effect to what the court intended to do. It is a power which is essential to ensure that justice is done. It is not possible pursuant to the power to vary an order which the court intended to make but an error in an order can be corrected so as to do justice and to give effect to the court's intention."

[11] In the circumstances of the present proceeding it is unnecessary to consider in depth the many authorities carefully researched by Mr Brett of counsel for the plaintiff to support the submission that there is no power in the Magistrates' Court to correct a "mistake" or "slip" made on the computer record of the Court. Cf. *Carroll v Price* [1960] VicRp 101; [1960] VR 651 at 657-660; *Paroukas v Katsaris* [1987] VicRp 4; [1987] VR 39 at 52-53. This proceeding, however, is not concerned with a "mistake" or "slip" in an order entered on the computer record because the Magistrate pronounced orally he intended to convict the plaintiff on charge 3 and entered on the computer record the conviction and penalty in respect of charge 3. he learned Magistrate's intention must be determined by reference to the findings he announced orally in Court. When he announced, as I find he did, that he found charge 3 proved and that the plaintiff would be convicted on this and other charges, he proceeded to enter a conviction and penalty on the computer record. This entry was consistent with the oral findings and no "mistake" or "slip" was made.

The plaintiff has now complied with Rule 56.01(5) and the Court will grant relief in the nature of *certiorari* to correct the record in the Magistrates' Court at Kyneton. The corrected record of the Court will show that the plaintiff was convicted of an offence against s49(1)(f) of the Act (charge 3) and a penalty of two months' imprisonment wholly suspended for two years etc. was imposed. The record will also show that charge 2 was struck out. **[12]** This decision does not deal finally with charge 2. The plaintiff may yet face trial in the Magistrates' Court on charge 2 for charge 2 was not finally determined on its merits by the Court.

The decision of Kaye J in *R v McGowan* [1984] VicRp 78; [1984] VR 1000 is directly in point. McGowan was considered in *Sammassimo* (unreported, O'Bryan J, 11/3/94) and by Hedigan J in *Douglas v Langton* (1992) 16 MVR 21. In *McGowan*, Kaye J decided that an order striking out an information was not a curial determination of the merits of the charge and did not put an end to the proceedings. An order striking out an information is not a determination of the merits of the charge and the information may be reinstated. In *Douglas* Hedigan J observed (at 27):

> "Such an order did not have the effect of detaching a proceeding permanently from the business of the Court and did not constitute a final determination of it."

Whether there was a dismissal on the merits of charge 2 on 16 January 1995 may become a matter for the Magistrates' Court to determine. Accordingly, the Court will make the following orders:

> (1) The Court grants *certiorari* and directs that the orders made by Ian Von Einem, Magistrate, in the following matter Case Number G00799099 Charge No. 2 and Charge No. 3 in which John Charles Rogers was informant and Wayne Kelly was defendant on 3 July 1995, that Charge No. 3 be struck out and that on Charge No. 2 the defendant be convicted be quashed and that in lieu an order be entered **[13]** on the computer record that Charge No. 2 be struck out and that on Charge No. 3 the defendant be convicted.
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> (2) The plaintiff's costs including costs incurred in the Magistrates' Court on 8 June 1995 and 3 July 1995 and of this application together with the costs of the originating motion are to be taxed and paid by the second-named respondent.

APPEARANCES: For the Plaintiff: Mr J Brett, counsel. Solicitors: Christopher Traill & Associates. For the First and Third Defendants: Mr P Golombek, counsel. Victorian Government Solicitor.
