25/85

SUPREME COURT OF VICTORIA

GARNER v GALLIENNE

Nicholson J

23 May 1985 — (1985) 9 ACLR 808

PRACTICE AND PROCEDURE – APPLICATION FOR RE-HEARING OF CRIMINAL MATTER – CONVICTION IMPOSED ELEVEN YEARS PREVIOUSLY TO LODGING OF APPLICATION –- APPLICANT WISHING TO AVOID CONSEQUENCES OF CONVICTION – MATTERS TO BE CONSIDERED BY MAGISTRATE IN EXERCISE OF DISCRETION: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, SS152, 154; *COMPANIES ACT* 1961, S122; *CRIMES ACT* 1914-1973 (CWTH), S29B.

In 1973, Gallienne was convicted of an offence against S29B of the Commonwealth *Crimes Act* 1914-1973 in that he imposed upon the Commonwealth by an untrue representation that his motor vehicle had been parked in the public car park at Melbourne Airport for a period less than the actual time. Gallienne did not appear and was fined $70 with $44 costs. In December 1984, Gallienne applied to have the conviction set aside and the matter re-heard. He said that the reason why he did not appear was that he was advised by his Solicitor not to appear and that he believed that the information was in the nature of a parking offence and did not involve dishonesty. It also emerged in the course of the hearing of the application that if the conviction were allowed to stand it could have dire consequences for Gallienne in his role as managing director of a substantial public company. It was sought to either move his conviction forward in point of time or possibly persuade the Court to exercise its discretion as to penalty in such a way that no conviction was recorded. The application was objected to on the ground that the informant was prejudiced by the delay in that – notwithstanding that the informant had a good recollection of the matter and had retained his records and notes of the case – the files of the Crown Solicitor and the Commonwealth Police had been destroyed. The Magistrate, in applying the principles enunciated in *Rosing v Ben Shemesh* [1960] VicRp 28; [1960] VR 173 and *Grimshaw v Dunbar* [1953] 1 QB 408; [1953] 1 All ER 350; [1953] 2 WLR 332 granted the application, set aside the conviction and order and ordered that the matter be re-heard. On order nisi to review—

HELD: Order nisi absolute. Application for re-hearing refused.

(1) The Magistrate fell into error in fettering the exercise of his discretion by the over-rigid application of rules derived from those cases to which he referred.

***McKenna v McKenna* [1984] VicRp 58; [1984] VR 665; and**

***Shepperdson v Lewis* [1966] VicRp 59; [1966] VR 418, applied.**

(2) Whilst the tests enumerated in those cases referred to by the Magistrate had relevance to the exercise of his discretion, they were far from an exclusive list of matters which he ought to have considered.

(3) In the exercise of his discretion, the Magistrate should have considered whether the informant would have been prejudiced in the presentation of his evidence, whether the Court would have been fully and properly informed as to the circumstances of the offence, and whether persons should be able to manipulate the effect of convictions, recorded many years previously, for reasons of personal convenience.

NICHOLSON J: *[After setting out the details of the offence, the reasons in support of the application for the re-hearing, and the effect of s122(1)(b) of the* Companies Act *1961, His Honour continued]* … **[5]** The Magistrate's reasons for the decision were as follows:

> "On the face of it it would seem that the matter is so old a re-hearing should not be granted. The legal principles are correct as put by Mr Walker. It was suggested the defendant did know that it was a serious offence, and not a parking offence. That could perhaps have been inferred at the time. However, the defendant gave evidence and in particular that he had consulted a solicitor and received advice from that solicitor. The advice was incorrect advice, although it could be said the solicitor might have some excuse because the summons is a little ambiguous. It is headed the '*Crimes Act* 1914-73' but it is also headed '*Judiciary Act* 1903-1969 of the Commonwealth of Australia' and '*Justices Act* 1958 State of Victoria'. The information refers to the *Crimes Act* and then refers to car parking and parking fee. They may be some excuse for the solicitor giving the incorrect advice. The defendant has acted upon that advice and decided not to attend court. I accept his evidence that it is because of that advice that he did not attend court. Applying *Grimshaw v Dunbar* and *Rosing v Ben Shemesh*

it appears that justice requires that a party who is absent because of incorrect legal advice in these circumstances, or other mischance or accident should be granted a re-hearing. Accepting that the reason he failed to appear was because of the advice he was given the matter should be reheard. I have taken into account the question of prejudice to the respondent and I have noted the undertaking given on Mr Gallienne's behalf and I am satisfied the respondent would not be prejudiced. I order that this conviction of 15th October 1973 be set aside and the matter re-heard."

The submissions of Mr Walker which the Magistrate appears to have incorporated by reference into his reasons for decision appear to have been derived from the decision in *Rosing v Ben Shemesh* [1960] VicRp 28; [1960] VR 173 as interpreted by Mr Walker to the effect that the relevant considerations in an application for re-hearing are -

"(a) The reason why the party failed to appear when the case was heard;

(b) whether there has been any delay by the absent party in launching his proceedings for a new trial;

[6] (c) whether the other party would be prejudiced by a new trial in any respect, which cannot be adequately compensated by a suitable award of costs and the giving of security."

So are as the question of prejudice was concerned, it appears that Miss Boddison, who appeared on behalf of the informant before the Magistrate told him the informant was prejudiced by the delay to the extent that both the files of the Crown Solicitor and Commonwealth Police had been destroyed, but that nevertheless the informant had a good recollection of the matter and had retained his records and notes of the case. The undertaking referred to by the Magistrate in his reasons was apparently Mr Walker's assurance to him that the facts upon which the prosecution had been based in 1973 were not in dispute and that the whole re-hearing was about the question of penalty.

The informant obtained an Order Nisi to review the decision of the Magistrate which I gave leave to amend to state the following grounds:

1. That the Stipendiary Magistrate's discretion under Sections 152 and 154 of the *Magistrates (Summary Proceedings) Act* 1975 miscarried insofar as:
(a) He found that –
(i) the form and/or
(ii) the wording
of the information and summons was or were ambiguous.

(b) he failed to have any or any proper regard to prejudice to the Informant's case.

2. The Stipendiary Magistrate was wrong in law in holding that if the applicant failed to appear at the hearing of the information because:
(a) he followed advice from his solicitor to that effect; and/or

(b) he was under a mistake or misapprehension as to the nature of the information he was entitled to an order setting aside the conviction.

[7] 3. Paragraphs (a) and (b) of Ground 2 were irrelevant considerations to take into account in setting aside the conviction, and the Stipendiary Magistrate was wrong in law in taking them into account."

It is, I think, material at this stage to refer to the terms of s152 of the *Magistrates (Summary Proceedings Act* 1975 which provides as follows:

"Where a conviction or order is made by a Magistrates' Court or by a Justice or Justices not sitting as a Magistrates' Court when one party does not appear, the party who does not appear may, subject to and in accordance with the provisions of this Part apply to the Court, or, in the case of a conviction or order by a Justice or Justices not sitting as a Magistrates' Court, the Court in which the conviction or order is recorded for an order that the conviction or order be set aside and that the information or complaint on which it was made be re-heard."

[8] Sections 153 and 154 relate to the requirement to give notice of the application and fix time for the hearing and the form and contents of the notice. Sub-s2 of s154 is as follows:

"Upon an application under this Part the Court may set aside the conviction or order subject to such terms and conditions with respect to costs or otherwise as it thinks fit."

Sub-section 3 enables the Court to proceed forthwith with the re-hearing or adjourn it to some convenient day and give notice to the other party, and sub-s4 provides for a stay of the original conviction or order pending the re-hearing. It can be seen that the discretion granted to the Court is expressed in the widest terms. The Director of Public Prosecutions for the Commonwealth, Mr Temby QC, who appeared with Miss Boddison before me for the informant, argued that s152 conferred a power to grant a re-hearing but did not impose any duty to do so, and that although failure to appear by a party at the original hearing was a condition precedent to the grant of a re-hearing, it was not a criterion for doing so and that the section did not confer any automatic right to a re-hearing. He further submitted that the section conferred a discretion on the Magistrate but a discretion which must be exercised judicially, taking into account relevant matters and excluding irrelevant matters. These submissions were of course clearly correct and were not disputed by the respondent.

Mr Temby first attacked the Magistrate's reasoning to the effect that because a party failed to attend because of incorrect legal advice this meant that he ought to be granted a re-hearing provided that there was no significant prejudice to the other party. He said that at best these were **[9]** no more than factors for the Magistrate to consider. He posed the question as to why a person who does not attend because he receives incorrect legal advice should be regarded as in any better position than one who does not seek legal advice and simply chooses not to attend, and said that it would be all too easy for an individual who did not like the result of a conviction to seek and obtain a re-hearing either by saying that he had received bad advice or that he did not understand the consequences of a conviction. He said that in the present case no attention seemed to have been given by the Magistrate to the fact that the respondent was not contesting the facts of the offence and contrasted his situation with that of a person seeking a re-hearing upon the basis that he was innocent of the offence in question.

He challenged the Magistrate's finding that the informant had not suffered any prejudice, and did so upon the basis that prejudice obviously did ensue from the fact that files had been destroyed albeit that certain documents were extant, and he said that the lapse of time clearly would make it extremely difficult for the informant to obtain and locate witnesses who might necessarily be called, even on a plea of guilty. He pointed out that although the respondent had indicated by his counsel that he would not contest the facts, the respondent would not be bound by such an indication, was not prevented from pleading not guilty and could, if he saw fit, contest the facts once a re-hearing was granted. Mr Temby argued that it was **[10]** ludicrous to grant a re-hearing after the lapse of time involved in this case, and he pointed to the fact that the respondent was not in ignorance as to what had happened but had made a conscious decision not to attend Court, and that in the ensuing eleven years the maximum penalty of $200 provided for the offence was now substantially increased, and yet the Court would be restricted to the maximum of $200 then available if a re-hearing was granted. He also pointed to the fact that if re-hearings after this period of time were readily granted, then police and prosecution authorities would be placed in an impossible position in that they would be required to keep records intact indefinitely, whereas they presently destroy such records after seven years. He said that from the point of view of prosecutions generally, therefore, a decision to permit the re-opening of a criminal case after eleven years had significant ramifications extending well beyond the present case.

In substance, the argument by Mr Dalton QC, who appeared for the respondent, was that the Magistrate had a discretion under s152 of the Act to determine whether or not the reasons given by the applicant as to why he did not appear were reasons which ought justify setting aside of the conviction. He said that there were no cases imposing guidelines on the exercise of such a discretion, but urged that the position was no different from that faced by a judge considering an application to strike an action out for want of prosecution, and he urged that the proper approach for this Court to adopt was that of Kitto J in *Australian Coal* **[11]** *and Shale Employees Federation and Anor v The Commonwealth* [1953] HCA 25; [1953] 94 CLR 621 at p627 where in a well known passage His Honour said that there was a strong presumption in favour of the correctness of the decision appealed from and that the decision should be affirmed unless the Court of Appeal is satisfied that it is clearly wrong. His Honour said:

> "A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to the facts. Again, the nature of the error may not be discoverable, but even

so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance."

I think that Mr Dalton was clearly correct in posing this as the test to be applied, and in fact it is the test which I do apply in considering the matter. Mr Dalton urged that reference to the Court's approach in civil cases such as *Rosing v Ben Shemesh* [1960] VicRp 28; [1960] VR 173 and *Grimshaw v Dunbar* [1953] 1 QB 408; (1953) 1 All ER 350 may be of some assistance, but he pointed to the fact that in actions to set aside a judgment in a civil field it was incumbent upon the person seeking to set the same aside to indicate that a case on the merits existed, and he contrasted that situation with an application for re-hearing of a criminal case where no such obligation need be undertaken by the person seeking the re-hearing.

Mr Dalton urged that it was difficult to think of many circumstances on their face which more readily called for the grant of a re-hearing than **[12]** the fact that the person who had not appeared had received wrong legal advice which led him not to do so. He said that in any event the Magistrate in this case had not really said that in every case where incorrect legal advice concerning attendance at the hearing had been given that a re-hearing should be granted, but he merely related the principle to the particular circumstances of this case. He conceded that so far as the question of delay was concerned, the length of delay was obviously a matter to be taken into account by the Magistrate, but he said that the reason for this related solely to matters of prejudice and where, as in the present case, there was little or no prejudice, then delay assumed less significance. Mr Dalton did not seek to defend the Magistrate's findings as to the alleged ambiguity of the information, but he said that these findings went to a peripheral matter, namely the factors which may have caused the solicitor to give wrong legal advice, and not to the substance of the Magistrate's decision which was based upon the fact that wrong legal advice had been given which caused the respondent to act in the way that he did. Mr Dalton said that no overall error had been demonstrated on the part of the Magistrate, and that applying the test suggested by Kitto J the order nisi should be discharged.

In order to determine the question as to whether the Magistrate's discretion miscarried, I do so in light of the amended grounds stated in the order nisi. Part (a) of ground 1 of these grounds relates to the learned Magistrate's finding that the form and/or the wording of the information and summons was ambiguous. **[13]** I find the Magistrate's comments in this regard difficult to comprehend, as I think it apparent on any fair reading of the information that the respondent was being charged with an offence against s29B of the Commonwealth *Crimes Act*. I am therefore unable to accept the learned Magistrate's reasoning. However, I do not regard this finding as indicative that his discretion miscarried, for I agree with Mr Dalton's submission that this part of his reasons for decision amounted to no more than speculation on his part as to why the respondent's solicitor may have given the respondent incorrect legal advice. This faulty reasoning does not, in my opinion, affect the Magistrate's finding that the respondent did not appear at the original hearing because he received incorrect legal advice, and this part of the order nisi will accordingly be discharged.

Part (b) of ground 1 presents more difficulty. It might have been better expressed in terms of a failure to have any or any proper regard to prejudice to the fair and just hearing of the information rather than in the narrower terms of prejudice to the informant's case. However, I think that prejudice to the informant's case can, if construed liberally, be regarded as bearing this broader meaning, and I indicate that if I thought it necessary I would grant an amendment to the ground to encompass the broader concept. However, I do not believe this to be necessary.

The learned Magistrate's reasons as to the question of prejudice were brief in the extreme. He said that he had taken into account the question of prejudice to the informant and had noted the undertaking given on Mr Gallienne's **[14]** behalf and was satisfied that the informant would not be prejudiced. It is clear from his decision that in making this finding he applied what he believed to be the law as stated in *Grimshaw v Dunbar* and *Rosing v Ben Shemesh*. If, as appears to be the case, he approached the question of the exercise of his discretion simply upon the basis outlined in those cases, then I think that he fell into error. First, those cases were civil cases where the litigant was applying to set aside a judgment in circumstances where he had failed to appear. They were thus clearly distinguishable from a criminal case where a much broader public interest

is involved. Principles that may be applicable to the adjustment of rights as between individual litigants may not necessarily be appropriate where it is proposed to interfere with the result of criminal proceedings determined many years previously, particularly where, as in this case, the proposed interference is not based upon any claim of innocence of the crime in question.

Secondly, and even more importantly, it would, in my opinion, he most unfortunate for Magistrates' Court to fetter the exercise of a broad discretion in cases of this nature by the over-rigid application of so-called principles derived from the civil jurisdiction of the superior courts. As McGarvie J pointed out in *McKenna v McKenna* [1984] VicRp 58; [1984] VR 665 at 674:

> "Decisions of judges in the exercise of a discretion are often useful to a judge later exercising the discretion. Earlier decisions may show what considerations are, and what are not, relevant to the exercise of the discretion. They may indicate what considerations are usually considered and what weights are usually accorded to particular considerations. They may **[15]** indicate the approach which is appropriate in the usual case. However they can not create either a formula to be followed or conditions precedent to be satisfied before the discretion can be exercised in a particular way. That would involve an impermissible fettering of the discretion. In that way judicial decision would destroy the flexible discretion which the law had conferred on the judge. Judges can not transfer to a formula, treated as created by earlier decisions, their personal responsibility to exercise the discretion."

See also *Shepperdson v Lewis* [1966] VicRp 59; [1966] VR 418 at p423 and *Niemann v Electronic Industries Limited* [1978] VicRp 44; [1978] VR 431. I think it apparent from an examination of the learned Magistrate's reasons for decision in this case that he did fetter his discretion by an over-rigid application of the supposed principles to be derived from *Grimshaw v Dunbar* and *Rosing v Ben Shemesh*, in that he appears to have treated those cases as setting out a code which should be applied in the exercise of his discretion. When one comes to examine these tests, it is apparent that although they have relevance, they are far from an exclusive list of the matters which ought to be considered in an application of this type. The first of the tests is to consider the reason why the respondent failed to appear. It was obviously relevant, of course, for the Magistrate to consider this matter but no doubt because of the above cases, I think that he gave it undue weight and some of his remarks would suggest that he treated it as almost determinative of the exercise of his discretion, rather than a mere factor in its exercise. **[16]** Again, the second of the tests suggested by those cases, that is whether there had been delay by the respondent in launching an application for a new hearing, seems to have been treated by the Magistrate as very much governed by the first in that once he accepted that the respondent had not appeared because of incorrect advice given him by his solicitor, then this not only explained but also excused his subsequent delay. In approaching the matter in this way, the learned Magistrate seems to have overlooked the broader question of the effect of the delay upon the conduct of a fair trial.

If, as appears to have been the case, the learned Magistrate went on to apply the third test to be gleaned from the cases of *Grimshaw v Dunbar* and *Rosing v Ben Shemesh*, then I think it likely that he again fell into error. That test is as to whether the other party would be prejudiced by a new trial in any respect which cannot be adequately compensated by a suitable award of costs and the giving of security. This test would appear to me to be peculiarly apt in relation to civil litigation. In a criminal proceeding, whilst it is, of course, relevant to consider whether the informant might be prejudiced in the presentation of his evidence, there are wider public considerations, such as whether the Court is likely to be fully and properly informed as to the circumstances of the offence and whether persons should be able to manipulate the effect of convictions recorded many years previously for reasons of personal convenience. The learned Magistrate does not appear to have turned his mind to any of these factors in arriving at his **[17]** decision, no doubt because he was content to follow the tests extracted from the cases cited to him. Further, in relation to such consideration as he did give to the question of prejudice to the informant, he did not appear to take into account the wider areas of prejudice which were touched upon by Mr Temby in argument, such as the possible inability of the informant to locate witnesses, or to present full evidence to the court of what had occurred, and the fact that the memories of such witnesses as could be located would obviously be detrimentally affected by the lapse of time. It was, in my opinion, no answer to this problem for the respondent to simply undertake that he would admit the facts alleged by the informant, for the lapse of time would inevitably mean that such facts as were alleged were likely to have been inadequate and incomplete. I am far from satisfied from the material that the learned Magistrate gave any or any proper consideration to such factors. I accordingly regard Part (b) of ground 1 as having been made out.

I turn now to ground 2. Again the learned Magistrate seems to have been unduly fettered in the exercise of his discretion by an over-rigid adherence to the principles set out in the cases cited to him. He apparently interpreted those authorities as meaning that justice requires that a party who is absent from Court because of incorrect legal advice in the circumstances of this case would be entitled to a re-hearing. Although this was, as I have said, a factor which he was entitled to take into account, it was not and should not have been regarded as determinative of the issue. The Magistrate seems to have dismissed the question of prejudice and largely ignored the question of delay outside the tests **[18]** stated in the above cases. I think that this part of the Order Nisi should also be made absolute for the reasons already given.

Ground 3 will be discharged as I am not prepared to hold that the matters referred to in parts (a) and (b) of Ground 2 were not matters which the learned Magistrate was entitled to take into account, albeit that I am of the view he gave them too much weight. Having regard to these findings, it becomes necessary for me to either refer the matter back to the Magistrate to be dealt with according to law or to substitute my own discretion for that of the Magistrate. I think that convenience dictates the latter course in this case. In considering that matter, I accept the Magistrate's finding that the respondent was advised by his solicitor, who had knowledge of the fact he was a company director, that the offence was akin to a parking offence and that it was unnecessary for him to appear. On the other hand, one would have thought that anyone who took the trouble to read the information would have realised that this advice was probably incorrect. Despite this I accept the Magistrate's finding that the respondent acted upon this advice, which was incorrect, and he did not appear for this reason. However, I do not accept that it necessarily excuses him as hereafter appears.

For the purpose of my decision, in addition to the evidence before the learned Magistrate, I take into account the matters contained in the affidavit of John Xavier Smith, the respondent's present solicitor, which was sworn on 22nd March 1983 in support of a speedy trial application and, of course, I have regard only to the matters contained in such **[19]** affidavits which are relevant to the questions before me. As I have said, a discretion such as the one conferred by s152 must be exercised in relation to the facts of the particular case, and statements of principle contained in the various authorities can only be used as a guide to the exercise of the same. Nevertheless, it is obvious that one of the principal factors that must be considered in an application of this type is the nature and extent of the delay and its likely effect upon a fair trial of the matter.

To my mind this is one of the most significant factors about the present case. It is obviously not normally in the public interest that criminal charges heard many years ago should be relitigated. Although in the present case it appears that by chance some records have survived in the hands of the informant, both the Crown Solicitor and the Commonwealth Police files have been destroyed and it may well be the Court could only be given an incomplete picture of the facts which constituted the offence. Further, prosecuting authorities must, of necessity, dispose of files and material after a reasonable time and I consider it to be in the public interest that they do so. If re-hearings such as this one are too readily granted after such a lengthy period, it becomes apparent that unreasonable requirements are likely to be imposed upon the police and prosecuting authorities. I am conscious that according to the affidavit of the respondent in this case, Miss Boddison told the Magistrate that the informant claimed to have a good recollection of the matters and had retained his records and notes relating to the case. However, it does not follow that his notes are complete, **[20]** or that he is the only relevant witness, or that his memory is as good as he thinks it is, or that the evidence which he can give would be sufficient to prove his case. I also note that the statement made by Miss Boddison was made in the content of a statement that the informant was, nevertheless, prejudiced by the destruction of the relevant files. I can understand that this was likely for as I have said, the so-called undertaking by the respondent not to contest the facts of the matters cannot of itself fill any gap if the facts available are incomplete.

Further, I think, that this undertaking bears more examination than it was given in the Court below. It was clearly not an undertaking to plead guilty. The fact that it was limited in its terms to an undertaking not to dispute the facts upon which the prosecution was based, left the respondent with the option of pleading not guilty and his agreement not to dispute the facts if honoured, would nevertheless leave the prosecution with the task of proving its case on the basis of admissible evidence. There was nothing before the learned Magistrate or myself to

suggest that it could do so and it is obvious that the passage of time and the missing files might well have meant that this task would have been difficult. Further, although I have no doubt that the undertaking was given by counsel in good faith on the basis of instructions from their client, it was an undertaking which would not have bound the respondent if he chose not to honour it after being granted a re-hearing. Finally, even if the respondent had pleaded guilty, this would have amounted to no more than an admission of the essential **[21]** ingredients of the offence. See *Baker v Flynn* [1982] WAR 289. It follows from what I have said that I am of the opinion that the effect of the delay of nearly eleven years raises a serious risk that there could not be a fair and just hearing of the matter. This, of itself, would be a sufficient reason for refusing the application for re-hearing, but there are additional facts which I shall now deal with.

I turn to consider the reason advanced by the respondent for his non-appearance and his explanation for the delay. As I have said, it was and it is a matter that is appropriate to be taken into account in the exercise of my discretion and I do so. I do not, however, afford it the significance attached to it by the learned Magistrate. It seems to me that a person who makes a conscious decision not to attend a hearing of an information lodged against him in a criminal proceeding, whether on the basis of legal advice or otherwise, does so at his peril, and a discretion to grant him a re-hearing in such circumstances should not be lightly exercised. It should not be forgotten that a right of appeal exists to the County Court, which carries with it a right to a re-hearing *de novo*, and I would have thought that in most cases where a defendant consciously decides not to appear, such a course is more appropriate than the grant of a re-hearing.

In favour of the respondent, it is relevant for me to consider the extreme personal difficulty in which he is placed by reason of the conviction as outlined in the affidavit of Mr Smith and I do so. The effect of the grant of a re-hearing would operate of itself to remove most, if not all, of this difficulty because even if the conviction and penalty were to be reimposed, it would only appear to have **[22]** effect from the date of the conviction – see *Lynch v Hargrave* [1971] VicRp 11; [1971] VR 99. However, I would regard it as an abuse of the process of the Court to permit applicants to so manipulate the Court's procedures so as to achieve such a result if their application is otherwise without merit. Indeed, this factor suggests that an appeal might have been the more appropriate course, if such course is still open to the respondent, about which I make no comment.

It is this personal hardship, though, which on the face of it provides the strongest ground in favour of the respondent being granted a re-hearing. It seems to me, however, when one analyses the matter, that there are strong reasons of policy for refusing an application based upon such a ground. This is not a case where an innocent person is coming to the Court endeavouring to clear his name in respect of a conviction unjustly imposed upon him. He does not contest the facts upon which the conviction is based but merely seeks to either move his conviction forward in point of time or possibly persuade a Court to exercise its discretion as to penalty in such a way that no conviction is recorded. In my opinion, to accede to such an application would be to permit a manipulation of the system that I do not believe was intended by the Act. While I feel considerable personal sympathy for the position of the respondent, I cannot let this sympathy override the principles upon which I believe a discretion under the Act should be exercised.

For the above-mentioned reasons grounds 1(b) and 2 of the order nisi will be made absolute and the order of the Magistrates' Court will be set aside and in substitution, **[23]** therefore, the application for re-hearing will be refused. Order that the respondent pay the applicant's costs to be taxed both in respect of the proceedings of the court below and in this court. I will grant an appropriate certificate under the *Appeal Costs Act*.
