22/73

SUPREME COURT OF VICTORIA

PITTAWAY v BASSETT

Gillard J

24 July 1973

PROCEDURE – DEFENDANT CONVICTED ON A CHARGE OF DRINK/DRIVING – CHARGE ADJOURNED TO A DATE TO BE FIXED NOT EXCEEDING TWO YEARS – DEFENDANT NOT RELEASED ON A BOND OF ANY SORT – WHETHER MAGISTRATE IN ERROR: *JUSTICES ACT* 1958, SS91(2), 92(2) (6).

HELD: Order nisi absolute. Magistrate's orders set aside. Remitted to the Magistrate for hearing and determination in accordance with the law.
It was contrary to the statutory duty cast upon the court by s91(2) of the *Justices Act* 1958 namely, that the court shall proceed to hear and determine the proceedings before it. It was of necessity that the information should be duly heard, evidence led, and a decision given. In this case, in fact, that is exactly what happened and at the conclusion of the evidence the magistrate did say that the defendant would be convicted. Having regard to these views, the magistrate either misdirected himself as to his powers under the provisions of the *Justices Act* or, alternatively, failed to carry out the responsibility imposed upon him to hear and determine this information and to make the appropriate order in relation to it. In effect, he declined jurisdiction.

GILLARD J: This is the return on an order nisi to review an order for adjournment on proceedings in which Ross Lachlan Bassett had been charged under the provisions of the *Motor Car Act* 1958 with having a reading of blood alcohol greater than .05 and in view of the course of the proceedings, it is unnecessary to recount the facts which gave rise to the prosecution. It would appear from the evidence, that the defendant was clearly guilty of an offence and at the conclusion of the hearing, the Magistrate had indicated that the defendant would be convicted. Instead of imposing any sentence, according to the record of the court, the Magistrate adjourned the hearing of the information to a date to be fixed, not exceeding the 17 May 1974 being two years after the original hearing.

I have had the benefit of a most useful discussion of the relevant statutory provisions and authority by Mr Douglas Graham who appeared to move the order absolute on behalf of the informant, and I myself have now had the opportunity over lunch-time to read something of the history of the material provisions of the *Justices Act* and of the relevant authorities.

It appears to me the most important decision to assist in the determination of this case is to be found in the judgment of Sir Edmund Herring in the case of *Lee v Saint* [1958] VicRp 25; [1958] VR 126; [1958] ALR 545. In that case, His Honor pointed out there are really three sources of power for a magistrate (sitting in the Magistrates' Court) to adjourn proceedings. The first is a power which arises from the constitution of every court to regulate its own proceedings so that justice is done. It is sometimes referred to as an inherent power to adjourn, but as His Honor pointed out at page 129:

> "I think there may be occasions when the circumstances are such to warrant such an adjournment being made under the inherent power of the court to adjourn proceedings before it, but I would expect such occasions to occur but rarely. In the ordinary course of events there can be no warrant for adjournments of this kind, for they may really involve refusal by the court to hear and determine a case then before it. Adjournments of this kind, like an adjournment for an unreasonable period, may, in effect, amount to the court declining jurisdiction."

The second source of power is to be found in s92(2) *Justices Act* 1958. This power, however, is circumscribed because the power must be exercised before or during the hearing, in the presence and hearing of the party or parties or their respective counsel, solicitors or other persons appearing for them, and the adjournment must be made to a certain time and place to be then appointed and stated. As Sir Edmund Herring pointed out in Lee *v Saint* (*supra*), this limited the power of adjournment considerably.

The third power to adjourn is to be found in s92(6) *Justices Act*, which, I think, was introduced into the Act in 1949 by Act No 5379. In short, after certain amendments had been made after 1949 to the initial part of the sub-section, it confers power on the Court to release any defendant appearing before it, by his entering into a recognisance for a reasonable amount and with or without sureties, to appear at a date subsequent to the hearing to which the proceedings may then be adjourned.

In *Timothy v Munro* [1970] VicRp 69; [1970] VR 528, Anderson J carefully traces the history of the sub-section and indicates the kind of thing that it is open to a magistrate to do under such sub-section. Mr Graham has urged on me, and I think he is probably right, that the magistrate here intended to exercise his power under this sub-section. If the magistrate did so, be failed to observe the pre-requisites to the exercise of the power. He did not require from the defendant any recognisance for good behaviour during the period of the adjournment.

Accordingly, it seems to me that if the magistrate did purport to act under that sub-section, then he failed to do so properly. It is clear that he could not exercise the power that he did under sub-s(2) of s92, and therefore it is a question of whether he attempted to exercise the inherent jurisdiction conferred upon a magistrate in such circumstances or whether he purported to exercise the power appointed under sub-s(6).

As I have already stated, if he purported to exercise the power under sub-s(6) then clearly, in my view, he has not exercised it properly. On the other hand, looking at the other alternative, that is to say, that he exercised the power under the inherent jurisdiction of the court, then, in my view, he has also exercised that power incorrectly. The inherent jurisdiction given to a court to regulate its own proceedings and to be able to grant adjournments given to ensure that justice is done in the procedures of the court, that the hearing is conducted in such a fashion as to do no injustice to any party appearing before the court, and that nobody is in any way hurt by the nature of the proceedings. In my view, it is an improper use of the inherent power to adjourn proceedings simply to save a defendant from the consequences of proof of his guilt of an offence.

Indeed, it also appears to me to be contrary to the statutory duty cast upon the court by s91(2) namely, that the court shall proceed to hear and determine the proceedings before it. It seems to me of necessity that the information should be duly heard, evidence led, and a decision given. In this case, in fact, that is exactly what happened and at the conclusion of the evidence the magistrate did say that the defendant would be convicted. Having regard to these views, it seems to me that the magistrate here either misdirected himself as to his powers under the provisions of the *Justices Act* or, alternatively, failed to carry out the responsibility imposed upon him to hear and determine this information and to make the appropriate order in relation to it. In effect, he declined jurisdiction as Herring CJ suggested.

In consequence of those views, I believe the magistrate has not carried out the task imposed upon him by the statute, and accordingly, the order nisi must be made absolute. The order nisi, in fact, was given on a number of grounds. I would be prepared to hold that in this case the order nisi should be made absolute on grounds one, two and three. I particularly refrain from dealing with ground four, because it does involve matters of principle in relation to the exercise of the magisterial discretion. It may be, from Mr Graham's argument, that there is a good deal to be said for the view that the magistrate failed to exercise his discretion properly or, if he did purport to exercise the discretion, it miscarried, because he had in mind matters which were not proper to take into account in exercising his discretion. Since the matter is going back to the magistrate, I think it inappropriate that I should express any view in relation to ground four.

The order, therefore, on the order to review No 6860, is that the order nisi is made absolute and the matter referred back to the magistrate to carry out his duty to determine the information according to law. The costs of this order nisi will have to be borne by the defendant, and in his absence, and looking after his interests, I grant him a certificate under the *Appeal Costs Fund Act*.

Similar considerations apply to the other five orders nisi that have been placed before me today. They cover a number of other offences which were committed on the same night by Ross Lachlan Bassett. As I say, it is unnecessary to go through the facts, because on the evidence it

was quite clear that he must have been found guilty in each case and, in fact, the magistrate was prepared to say that the cases were proved and the defendant convicted. The same considerations apply, as I have stated, with respect to the order to review No. 6860, and accordingly, in relation to the remainder of the orders nisi. Each of them will be made absolute on the same three grounds and there will be a similar order for costs with a similar referral back to the magistrate to determine each of the informations in accordance with the law. In each cases I grant a certificate to the defendant under the provisions of the *Appeal Costs Fund Act*. The order for costs is the same in each case.
