**41/75**

## SUPREME COURT OF VICTORIA

# *MUNZEL v WALL*

**Murray J**

**18 March 1975**

**PROCEDURE – APPLICATION FOR REHEARING – INFORMATION SERVED BY POST – DEFENDANT DID NOT ATTEND HEARING – DEFENDANT REQUIRED TO APPLY FOR A REHEARING WITHIN SEVEN DAYS – DEFENDANT MADE APPLICATION THREE MONTHS AFTER BECOMING AWARE OF THE CONVICTION – APPLICATION FOR REHEARING DISMISSED – WHETHER MAGISTRATE IN ERROR: *JUSTICES ACT* 1958, SS25(4), 69.**

The offences alleging motor car breaches whereby the defendant was fined and his licence was cancelled for a period of nine months took place in December 1971. The defendant went interstate in February 1972 and did not return to his parental home until June 1973. The informations were served by post in accordance with the provisions of s25 of *Justices Act* 1958 and heard on 30th October 1972. The defendant learned of the penalty on his return home and three to four months later applied for a re-hearing under s69 of *Justices Act* on the basis he did not receive the notice of the hearing until "some time after the date of the hearing". The application was dismissed.

In this case it was considered whether the specific provisions of s25(4) for applying for a rehearing within seven days where service by post precluded the operation of s69 for setting aside and rehearing an *ex parte* order. Upon order nisi to review—

**HELD: Order nisi discharged.**
**1. Upon their true construction, s25(4) and s69 of the *Justices Act* 1958 ('Act') are perfectly capable of operating side by side and there is no good reason to think that one of them operates to exclude the other.**

**2. A distinction between s25 and s69 of the Act is that the provisions of s25 appear to give the applicant for re-hearing almost an automatic right of a re-hearing provided that he satisfies the Court that he did not have notice of the summons prior to his being convicted and that he applied for a re-hearing within seven days after he first became aware of his conviction by complying with the provisions of the section.**

**3. On the applicant's version he learned in June 1973 of his conviction and of the cancellation of his licence, and yet it was not until September – some three to four months later – that he chose to take any action. Had the Magistrate made enquiry as to the reason for that delay, a reason may well have emerged which would of itself have been sufficient to justify the Magistrate refusing the application.**

**4. The Magistrate was well aware that the application was made under s69, and that his reference to s25 was merely a reference to one of the factors which led him to exercise his discretion against the applicant. It did not appear that it could be said that in arriving at that decision the Magistrate either failed to exercise his discretion, or exercised it in a wrong way or pursuant to wrong principles and accordingly, the order nisi was discharged.**

**MURRAY J:** ... It appears to me that upon their true construction s25(4) and s69 are perfectly capable of operating side by side and there is no good reason to think that one of them operates to exclude the other.

As I indicated in the course of argument it would be extraordinary if when Parliament first permitted service of quasi-criminal proceedings by post it at the same time made stringent limitations upon the rights of persons who had been convicted in their absence to apply for a re-hearing. In other words, a person who has been convicted upon the hearing of an information served by post would be in an infinitely worse position than a person who has been convicted upon the hearing of an information served personally and who failed to attend the Court for the hearing.

The second distinction which I see between s25 and s69 is that the provisions of s25 appear to me to give the applicant for re-hearing almost an automatic right of a re-hearing provided that he satisfies the Court that he did not have notice of the summons prior to his being convicted and that he applied for a re-hearing within seven days after he first became aware of his conviction by complying with the provisions of the section.

Section 69, however, confers no such absolute rights and merely gives a person who was not present when a conviction or order was made against him the right to apply to have the order or conviction set aside and a re-hearing of the matter. Under sub-s (4) of s69 the Court is then completely at large as to whether to grant a re-hearing or not. In other words it is a matter for the Court's discretion.

If I were to accept the account as it appears in the affidavit in support of the order nisi, I would be disposed to think that the Magistrate had mis-directed himself and to send the matter back to him to deal with in accordance with the law. I might point out, however, that having regard to what the Magistrate has said in his affidavit, even if I were to do this, it would seem that the applicant would have very little hope of success. However, the Magistrate saw fit to file an affidavit in reply, and in that affidavit he stated that when he retired to consider the matter he intended to consider it in the light of s69, and that it was the Bench Clerk who pointed the provisions of s25 out to him.

The Magistrate goes on in his affidavit to dispute the account given in what he refers to as paragraph 18 of the application in support, but which undoubtedly must be paragraph 17. The Magistrate states that 'although I held that the applicant in this case was precluded from obtaining the relief conferred pursuant to s69 because of his failure to make an application under s25 within the time there specified, I, to the best of my belief, further stated that the maxim, the law does not assist those who sleep on their rights, applied in the circumstances disclosed in this particular matter.' The Magistrate proceeded to say that he had no recollection of having stated as a general proposition that whenever a summons is served by post the only means of application for re-hearing is pursuant to s25 to the exclusion of s69.

There is some ambiguity in this paragraph of the Magistrate's affidavit which springs mainly, in my opinion, from his use of the word 'precluded', but notwithstanding that ambiguity, it appears to me that if the Magistrate had really thought that the application had to be dealt with under s25, any question of the maxim, that the law does not assist those who sleep on their rights, would be irrelevant because the admitted facts were that the applicant did not comply with the provisions of s25(4).

Furthermore, if the Magistrate took that view, it would have been applicable to all cases, whereas in his affidavit by the underlining of the words 'in this case' the Magistrate appears to be saying that, on the particular facts of this case, the failure of the applicant to avail himself of his rights under s25 was a matter which played a part in the exercise of the Magistrate's discretion under s69, to lead him to refuse to grant a re-hearing.

In my opinion, this interpretation of what the Magistrate said in his affidavit is made more probable by the fact that on the applicant's own version he learned in June of 1973 of his conviction and of the cancellation of his licence, and yet it was not until September – some three to four months later – that he chose to take any action.

Had the Magistrate made enquiry as to the reason for that delay, a reason may well have emerged which would of itself have been in my view sufficient to justify the Magistrate refusing the application.

For those reasons, I do not take the view that the Magistrate mis-directed himself and, in my opinion, the view on the evidence as supplied by the two affidavits indicates that the Magistrate was well aware that the application was made under s69, and that his reference to s25 was merely a reference to one of the factors which led him to exercise his discretion against the applicant. It does not appear to me that it could be said that in arriving at that decision the Magistrate either failed to exercise his discretion, or exercised it in a wrong way or pursuant to wrong principles and accordingly, the order nisi must be discharged.